No. 06-

IN THE

Supreme Court of the United States

EUSEBIO GUEVARA,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the statutory and regulatory regime under which the Department of Justice adjudicates removal cases, Immigration Judges ("IJs") are responsible, in the first instance, for determining whether an alien is removable from the United States—and, if so, whether any relief from removal is appropriate. The Board of Immigration Appeals ("BIA"), an administrative appellate body, reviews IJs' orders; such BIA review is a prerequisite to an alien seeking judicial review of a removal decision in an Article III court.

It is common ground among the U.S. Courts of Appeals that, where an IJ has ordered that an alien be removed from the United States after (i) determining that the alien is removable and (ii) denying all relief from removal, the BIA has the power to order the alien removed by simply affirming the IJ's order. The question presented in this case involves the BIA's power to order removal when it *disagrees* with an IJ's grant of relief from removal:

Whether, where an IJ has (i) determined that an alien is removable but (ii) granted relief from removal, and on appeal the BIA reverses the grant of relief from removal, the BIA may itself order an alien removed, or instead, must remand the matter to the IJ for entry of an order that the alien be removed.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to this case before the IJ and BIA were petitioner Eusebio Guevara, an individual, and Alberto R. Gonzales, the Attorney General of the United States, in his official capacity.

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PETITION FOR A WRIT OF CERTIORARI

Eusebio Guevara respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the IJ (Pet. App. 12a) and the decision of the BIA (Pet. App. 9a) are both unpublished.

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on January 8, 2007, and is reported at 472 F.3d 972. (Pet. App. 1a.)

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on January 8, 2007. (Pet. App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 8 of the United States Code, Section 1101(a)(47), provides:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of—
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the [BIA].

Title 8 of the Code of Federal Regulations, Section 1003.1(d)(1)(i), provides, in pertinent part:

> Powers of the Board—Generally. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. . . . The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures[.]

STATEMENT

Under the Immigration and Naturalization Act ("INA"), an alien may only be removed from the United States when a valid "order of deportation" has been entered against the alien.[1] The opinion below is the latest in a series of conflicting decisions of the Courts of Appeals on the issue of the proper procedure where an IJ has found an alien removable but granted the alien relief from removal, and the BIA affirms the finding of removability but reverses the grant of relief. The question on which the courts differ is whether in that instance the BIA has the power to itself order the alien removed, or instead, must remand the matter to the IJ for further consideration or for entry of an order that the alien be removed. The conflict implicates the relative

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[1] Due to the extensive changes to the Immigration Code in recent years, two terminology points bear highlighting. *First*, the current terms "removal" and "removable" are synonymous with the archaic terms "deportation" and "deportable"; thus a removal order in current parlance is the functional equivalent of an order of deportation, which still appears in some statutes and regulations. *See* 8 U.S.C. § 1229a(e)(2)(B); *Evangelista v. Ashcroft*, 359 F.3d 145, 147 n.1 (2d Cir. 2004), *cert. denied*, 543 U.S. 1145 (2005); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 11-12 (3d Cir. 2003). *Second*, an IJ is the current term for what some anachronistic statutes and regulations still refer to as a "special inquiry officer." *See* 8 C.F.R. § 1.1(*l*) (1996); *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 883 n.7 (9th Cir. 2003).

institutional competence of IJs (who act as trial judges under the statutory and regulatory scheme of the INA), and the BIA (which acts as an appellate body), to order an alien removed from the country. The question turns on the meaning of the statutory term "order of deportation."

The Ninth Circuit, the first Court of Appeals to address the question, ruled that only an IJ may order an alien removed. In parsing the relevant statutes and regulations, that court concluded that an IJ's finding that an alien is removable does not meet the statutory definition of an "order of deportation." Accordingly, where an IJ has found an alien removable, but has also granted relief from removal—and thus, not ordered the alien removed—the Ninth Circuit requires the BIA to remand the case to the IJ for further consideration and an entry of an "order of deportation" in the event that the BIA affirms the finding of removability but reverses the grant of relief. The court reasoned that as an appellate body, the BIA simply lacks the power to enter such an order in the first instance.

In contrast, in this case, the Seventh Circuit—joining the Second, Fifth, and Eighth Circuits, but in acknowledged conflict with the Ninth Circuit—held that where an IJ has found an alien removable, that finding itself constitutes an "order of deportation." That is so, the court ruled, even if the IJ did not actually order the alien removed, but instead, granted relief from removal. From there, the court reasoned that by affirming the finding of removability, while reversing the grant of relief from removal, the BIA in effect affirms an "order of deportation," and can thereby order the alien removed of its own power, without the need for a remand. (Pet. App. 7a-8a.) In other words, the Seventh Circuit ruled that the BIA was itself "empowered to order [an alien] removed . . . ." (*Id.* at 8a.)

A. The Applicable Statutory and Regulatory Framework.

An alien who has lawfully entered the United States may only be forced to leave pursuant to removal proceedings. U.S. Dep't of Justice, Executive Office for Immigration Review, Types of Immigration Court Proceedings and Removal Hearing Process, Fact Sheet (July 28, 2004), *available at* http:// www.usdoj.gov/eoir/press/04/ ImmigrationProceedingsFactSheet2004.pdf (last visited April 6, 2007) [hereinafter "Removal Hearing Fact Sheet"], at 1 ("[T]he removal proceeding is now generally the sole procedure for determining whether an alien is inadmissible, deportable, or eligible for relief from removal."). "Removal 'visits a great hardship on the individual and deprives him [or her] of the right to stay and live and work in this land of freedom.' It is 'a drastic measure' and for some 'the equivalent of banishment or exile.'" *Lanza v. Ashcroft*, 389 F.3d 917, 927 (9th Cir. 2004) (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) and *Jordan v. De George*, 341 U.S. 223, 231 (1951)).

Consistent with the gravity of removal proceedings, the U.S. Department of Justice has divided responsibility for adjudicating them between two principal Article II decision makers: IJs and the BIA. *See Benslimane v. Gonzales*, 430 F.3d 828, 829-30 (7th Cir. 2005). These two decision-makers operate within distinct spheres of competence: The IJ acts as a trial judge, deciding matters in the first instance, while the BIA acts as an appellate body, reviewing the decisions of IJs.

1. Removal Proceedings Before an IJ.

IJs adjudicate removal proceedings in the first instance. 8 U.S.C. § 1229a; *see id.* § 1229a(a)(1) ("An [IJ] shall conduct proceedings to decide the inadmissibility or deportability of an alien."); 8 C.F.R. § 1240.1(a); *id.* § 1003.10 ("[IJ]s . . . shall exercise the powers and duties in this chapter regarding the conduct of . . . removal[.]").

Removal proceedings are commenced with a notice to appear, a charging document that invokes the power of the immigration court to determine whether an alien is removable. 8 U.S.C. § 1229(a)(1); 8 C.F.R. § 1239.10. Thereafter, the IJ acts essentially as a trial judge presiding over the removal proceedings. The IJ "administer[s] oaths, receive[s] evidence, and interrogate[s], examine[s], and cross-examine[s] the alien and any witnesses"; may "issue subpoenas for the attendance of witnesses and presentation of evidence"; and even has "authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority[.]" 8 U.S.C. § 1229a(b)(1).

"Removal proceedings generally require an [IJ] to make two findings: (1) a determination of the alien's removability from the United States, and (2) thereafter deciding whether the alien is eligible for a form of relief from removal." Removal Hearing Fact Sheet at 2.

First, an IJ must "[d]etermine removability." 8 C.F.R. § 1240.1(a)(i); *see* 8 U.S.C. § 1229a(c)(1)(A) ("At the conclusion of the proceeding the [IJ] shall decide whether an alien is removable from the United States. The determination of the [IJ] shall be based only on the evidence produced at the hearing."). The government bears the burden of proof on this inquiry. *Id.* § 1229a(c)(3)(A). In practice, though, this determination is commonly made, or even conceded, at an early proceeding before an IJ. *See* 8 C.F.R. § 1240.48(b) ("If the respondent admits the factual allegations and admits his or her deportability under the charges and the [IJ] is satisfied that no issues of law or fact remain, the [IJ] may determine that deportability as charged has been established by the admissions of the respondent."); Sydenham B. Alexander III, *The Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 5 (2006) [hereinafter "*Political Response*"] ("Only a small portion of immigration court cases turn on contested questions of

removability. . . ."). A finding of removability is a prerequisite to an IJ's consideration of any kind of relief from removal. *See* 8 U.S.C. § 1229a(c)(3), (4).

Second, if the IJ determines that an alien is removable, he must decide whether the alien should be granted relief from removal. This question is the focal point of most removal cases. *Political Response* at 5 ("In the vast majority of immigration court cases, . . . noncitizens concede that they are removable and seek to prevail at the second legal stage by showing that the law entitles them to relief."). Such relief can take various forms, including asylum (8 U.S.C. § 1158(a)), cancellation of removal (*id.* § 1229b(a)), withholding of removal (*id.* § 1231(b)(3)), protection under the Convention Against Torture (8 C.F.R. §§ 1208.16-1208.17), or adjustment of status (8 U.S.C. § 1255). The alien bears the burden on the relief inquiry. 8 C.F.R. § 1240.8(d). Often, the finding of removability will be made at a preliminary hearing before the merits hearing on alien's claim for relief from removal; indeed, an alien's request(s) for relief from removal are commonly not decided until months following a threshold determination of removability. *See, e.g.*, *Ly v. Hansen*, 351 F.3d 263, 265-66 (6th Cir. 2003) ("At the September 21, 1999 hearing, the immigration judge found that Ly was removable. Ly then filed applications for relief from deportation on various grounds . . . . The immigration judge set a merits hearing for Ly's other applications for relief for March 16, 2000[.]"); Pet. App. 8a (acknowledging that concluding that an alien is deportable is a "threshold determination"); *see also Introduction To Practice Before The Executive Office Of Immigration Review*, SJ080 ALI-ABA 213, 218 (2004) (noting that a request for relief from removal generally requires a "separate 'merits' hearing").

Based on the evidence adduced in proceedings before the IJ, the IJ may enter an "order[] of removal." 8 C.F.R. § 1240.1(a)(1)(i); *id.* § 1240.12(c) (granting the IJ the power to "direct [an alien's] removal"). This order is also known as

an "order of deportation." *E.g.*, *id.* § 1240.50(c) ("The order of the [IJ] shall direct the respondent's deportation, or the termination of the proceedings, or such other disposition of the case as may be appropriate. When deportation is ordered, the [IJ] shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed."). "Order of deportation," in turn, is defined by statute to mean: "the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). "If the [IJ] decides that the alien is removable and orders the alien to be removed, the [IJ] [must] inform the alien of," among other things, "the right to appeal that decision . . . ." *Id.* § 1229a(c)(5); 8 C.F.R. § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . .").

2. Review of an IJ's Decision by the BIA.

Agency review of an IJ's decision in removal proceedings is available in, and delegated to, the BIA. The BIA is "an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it." 8 C.F.R. § 1003.1(d)(1)(i). By regulation, those decisions include "[d]ecisions of [IJs] in removal proceedings." *Id.* § 1003.1(b)(3).

When reviewing an IJ's decision, the BIA functions much like any other appellate body. It may take judicial notice, but otherwise may not find facts. 8 C.F.R. § 1003.1(d)(3)(iv) ("Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding

must file a motion for remand."). It may review an IJ's findings of fact, "including findings as to the credibility of testimony," but "only to determine whether the findings of the [IJ] are clearly erroneous." *Id.* § 1003.1(d)(3)(i). Other standards of review are specified by regulation as well. *Id.* § 1003.1(d)(3)(ii).

Where an alien appeals an "order of deportation" to the BIA, and there is "a determination by the Board of Immigration Appeals affirming such order," the order of deportation is considered "final." 8 U.S.C. § 1101(a)(47)(B)(i); 8 C.F.R. § 1241.1(a). At that point, an alien may seek review of the BIA's decision by way of a petition for review to an Article III court—and specifically, a U.S. Court of Appeals. 8 U.S.C. § 1252(a)(1). If, however, an "order of deportation" is issued by an IJ, but not appealed to the BIA within 30 days, it also becomes "final"— with starkly different consequences. *Id.* § 1101(a)(47)(B)(ii); 8 C.F.R. § 1003.39; *id.* § 1241.1(c). At that point, the alien has forfeited all review as of right: any appeal to the BIA would be untimely, *see* 8 C.F.R. § 1003.38(b); *id.* § 1003.3(a)(1), and the federal courts may not hear a petition for review if all administrative remedies were not exhausted, 8 U.S.C. § 1252(d)(1).

3. Removal of an Alien.

By statute, "when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days." 8 U.S.C. § 1231(a)(1)(A). The finality of the "order of deportation"/"order of removal" is crucial in determining when this deadline occurs. Specifically, the 90-day "removal period" runs from the latest of:

> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. § 1231(a)(1)(B). The statute requires that, "[d]uring the removal period, the Attorney General shall detain the alien." *Id.* § 1231(a)(2).

B. Background Of The Instant Case.

Petitioner Eusebio Guevara, a Honduran with Lawful Permanent Resident status, was placed into removal proceedings in 2004 when he returned from a trip abroad. (Pet. App. 1a.) He was charged with inadmissibility for having been convicted of a crime of moral turpitude. This charge was based on Guevara's convictions for shoplifting a pair of pants in 1991, and two counts of fourth-degree sexual assault (a misdemeanor) in 1996. (*Id.*) After hearing arguments from both parties, the IJ made a finding that Guevara was removable based on the misdemeanor sexual assault convictions. (Pet. App. 13a.)

The IJ then turned to Guevara's request for relief from removal under a now-repealed statute, 8 U.S.C. § 1182(c). (*Id.*) Guevara presented evidence in support of his petition, including letters attesting to his character, evidence of the dire situation in Honduras, and evidence that he was the sole provider for his wife and children in Honduras. (Pet. App. 16a.)

The IJ considered all of this evidence, and weighed the positive and negative factors for granting relief. The IJ first noted that Guevara's convictions weighed against relief (Pet. App. 17a), although the shoplifting offense carried minimal negative weight, in the IJ's eyes, because the value of the shoplifted item was small and it did not appear to be part of a larger pattern of theft. (*Id.*) Nevertheless, the IJ found that Guevara would "ha[ve] to show equities which rise to a fairly significant level in order to merit the granting of relief" because of the misdemeanor sexual-assault convictions. (Pet. App. 18a.)

The IJ then considered the positive equities in Guevara's favor. The IJ found several positive factors, including Guevara's 19-year presence in the United States, his 14-year period as a permanent resident, and his solid work history. (*Id.*) The IJ also found that sending Guevara back to Honduras would have negative economic consequences for his family. (*Id.*) Additionally, in light of Guevara's law-abiding conduct in the eight years since his most recent conviction, the IJ found that rehabilitation was a positive factor. (Pet. App. 19a.) The IJ noted that Guevara had expressed remorse for his convictions, had not been arrested or charged with any offenses for eight years, had altered his life during those eight years, and had "been reformed so that . . . future criminal misconduct is unlikely." (*Id.*)

Balancing these positive and negative factors, and finding that the positive ones outweighed the negative ones, the IJ granted Guevara relief from removal. (Pet. App. 2a-3a.)

The government appealed the IJ's decision to the BIA. The BIA agreed with the IJ that Guevara was statutorily eligible for relief from removal under 8 U.S.C. § 1182(c). (Pet. App. 11a.) It disagreed, however, with how the IJ had weighed the positive and negative equities in deciding to award that relief. (*Id.*) The BIA therefore sustained the government's appeal. (*Id.*) It concluded its opinion with the following order: "The respondent is ordered removed from the United States to Honduras." (*Id.*)

C. The Court of Appeals' Decision

Guevara then petitioned for review of the BIA's decision in the United States Court of Appeals for the Seventh Circuit. He argued that under the current statutory and regulatory scheme, the BIA lacked the power to order him removed from the country, as it had done, when the IJ had entered no such order in the first instance. (Pet. App. 6a.) Acknowledging that its ruling was in direct conflict with the Ninth Circuit, the court nonetheless affirmed the BIA's order. (Pet. App. 7a.)

The Seventh Circuit's analysis focused on the statutory definition of "order of deportation" found in 8 U.S.C. § 1101(a)(47)(A), which defines the term as "the order of [the IJ] . . . *concluding that the alien is deportable* or ordering deportation" (emphasis added). (*Id.*) The court recognized that the IJ had not ordered Guevara removed from the United States, but instead, had issued an order granting him relief from removal. (Pet. App. 8a.) But the Seventh Circuit reasoned that the IJ found that Guevara was removable before granting relief from removal, and that former finding was itself an "order of deportation." (Pet. App. 7a-8a.) Accordingly, the court ruled that the BIA had merely affirmed the IJ's "order of deportation," while reversing its grant of relief from removal. *Id.* As the court put it:

> In Guevara's case, the IJ initially determined that Guevara was removable for having committed a crime involving moral turpitude. Pursuant to 8 U.S.C. § 1101(47)(A), this threshold determination constituted an order of deportation (i.e., removal) that could be given effect by the BIA once it reversed the IJ's subsequent conclusion that Guevara was entitled to a discretionary waiver of removal . . . . In other words the BIA rejected only the waiver determination in the IJ's decision, leaving the IJ's first holding—that of removability—intact. The BIA was thus empowered to order Guevara removed to Honduras.

(Pet. App. 8a.) The court thus denied Guevara's petition for review. (*Id.*)

REASONS FOR GRANTING THE WRIT

The question presented in this petition is both important and likely to recur. *See, e.g.*, Petition for Writ of Certiorari, *Lazo v. Gonzales*, No. 06-935 (Dec. 29, 2006), *available at* 2006 WL 3877338. This Court should grant this petition, and resolve the question, for three basic reasons:

First, the Seventh Circuit's decision exacerbates an entrenched and persistent split among the Courts of Appeals

on a basic question of how to administer removal cases. The central question of what part of the administrative immigration apparatus has the power to effect removal of an alien from the United States is, by itself, of crucial importance. "The liberty interests involved in removal proceedings are of the highest order." *Lanza*, 389 F.3d at 927. Accordingly, as both Congress and the Executive Branch have recognized, an alien should be able to know whether, following entry of an order in his case, he may stay or he must go. 8 U.S.C. § 1229a(c)(5) (requiring that "[i]f the [IJ] decides that the alien is removable and orders the alien to be removed" the IJ must "inform the alien," *inter alia*, of "the consequences for failure to depart under the order of removal, including civil and criminal penalties"); 8 C.F.R. § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . . ."). The answer to that question should not depend upon the happenstance of where an alien's removal proceedings happen to take place. Nor is remanding to the IJ to enter an order of deportation just a matter of form. Where removability is found, multiple kinds of relief from removal are requested, and where one form of relief is clearly appropriate, an IJ might simply award that and not rule on the others. Where the BIA later overrules such a grant of relief, the IJ should be given the opportunity to reach other forms of relief requested. The logic of the majority rule, however, could be read to prevent that.

Second, the majority rule—which the Seventh Circuit adopted—cannot be squared with the statutory and regulatory scheme that governs the processing of removal cases. That scheme makes clear delineations between the relative competence of IJs, on the one hand, and the BIA, on the other. The BIA, an appellate body, has no legitimate authority in that scheme to enter an order of deportation in the first instance. Nor is it a response to say, as the Seventh Circuit did, that in reversing an order of an IJ allowing an

alien to *remain* in the United States, the BIA is actually affirming an "order of deportation," simply because an IJ found an alien to be removable before deciding that the alien should *not* be deported. Equating an order refusing to deport an alien with an "order of deportation" not only strains the limits of language, but also creates irreconcilable tensions with the statutory and regulatory immigration scheme as a whole.

Third, the issue, and the logic of the majority rule, also threaten broader practical ramifications for an already overtaxed immigration system. Entry of an "order of deportation" triggers appeal deadlines. Under the rule that prevails in the Ninth Circuit (which adjudicated nearly half of all petitions for review of BIA decisions in the year 2006),[2] an "order of deportation" describes only an IJ's order that an alien be removed. Such an order can only be entered by an IJ after the IJ decides both the question of removability and any claims for relief from removal. Accordingly, in the Ninth Circuit, an alien may safely wait until the end of proceedings before the IJ to begin the appeals process. In contrast, the rule that now prevails in the Second, Fifth, Seventh, and Eighth Circuits (which together adjudicated nearly one third of all petitions for review of BIA decisions in the year 2006)[3] holds that an IJ's traditionally threshold determination that an alien is removable is, by itself, an "order of deportation." Therefore, thousands of aliens whose cases arise in circuits following the majority rule could be required to appeal to the BIA immediately upon an IJ's finding of removability—regardless whether the IJ

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[2] *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2006) at Table B-3, *available at* http://www.uscourts.gov/judbus2006/contents.html (last visited April 6, 2007).

[3] *See id.*

ultimately orders the alien removed—lest they waive their right to BIA (and eventually Article III) appellate review. The logic of the majority rule thus threatens to encourage piecemeal appeals to an already backlogged BIA, not to mention exacerbate an already overwhelming flow of petitions for review of BIA orders filed in the U.S. Courts of Appeals.

By reversing the Seventh Circuit, the Court can bring clarity to the question of which entity within the administrative immigration scheme has the power to order an alien removed. By doing so, the Court will simultaneously eliminate the potential for a myriad of unnecessary piecemeal appeals per year.

I. THE OPINION BELOW DEEPENS AN INTRACTABLE SPLIT AMONG THE CIRCUITS.

As the Seventh Circuit acknowledged in its opinion, its holding conflicts with decisions of the Ninth Circuit, but aligns with the rule which governs in the Second, Fifth, and Eighth Circuits. The opinion thus exacerbates an already entrenched and square circuit split on the question of the proper interpretation of the term "order of deportation" under 8 U.S.C. § 1101(a)(47)(A).

The Ninth Circuit was the first Court of Appeals to weigh in on the question. In *Molina-Camacho v. Ashcroft,* 393 F.3d 937 (9th Cir. 2004), that court held that, where an IJ has found an alien removable but granted relief from removal, and the BIA affirms the finding of removability but reverses the grant of relief, the BIA may not itself order removal of the alien, but must instead remand the case for the IJ to make that judgment and order.

In *Molina-Camacho*, as in this case, the IJ found the petitioner removable but granted discretionary relief from removal. The BIA affirmed the former finding, but reversed the grant of relief. 393 F.3d at 938-39. The BIA ordered the petitioner removed to Mexico. On appeal, the Ninth Circuit held that the BIA does not have the authority to order an

alien deported after reversing an IJ's grant of relief from removal. *Id.* at 941.

The court came to this conclusion based on the statutes and regulations delineating the respective powers of IJs, on one hand, and the BIA, on the other. The court began by examining the statutory definition of "order of deportation," noting that the statute defines an "order of deportation" as being an order entered "*by a special inquiry officer* [the former term for IJ]," not the BIA. *Id.* at 940. Thus, the plain text of the definitional statute itself indicates that the IJ, and not the BIA, is the proper official to enter an "order of deportation."

The court drew support for this conclusion from the regulatory scheme established to administer removal cases. The court observed that "nothing in the regulations enumerating the powers of the BIA indicates that the scope of those powers goes beyond appellate review of [IJ]s' decisions and other 'administrative adjudications.'" *Id.* (citing 8 C.F.R. § 1003.1(d)(1), and § 1003.1(b)(2)). The lack of regulatory authority for the BIA to issue orders of removal, however, stands in stark contrast to the clear and extensive regulatory authority of IJs to do so. 393 F.3d at 940-41 (citing 8 C.F.R. § 1240.1(a)(1)(i) (granting the IJ authority to issue order of removal); *id.* § 1240.12(c) ("The order of the [IJ] shall direct the respondent's removal from the United States, or the termination of the proceedings, or such other disposition of the case as may be appropriate."); *id.* § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . ."); *id.* at § 1241.1 (explaining when "[a]n order of removal *made by the immigration judge* . . . shall become final") (emphasis added).)

For its part, the government pointed to a different portion of the definition of "order of deportation," noting that the definition extends to orders "concluding that the alien is

deportable *or* ordering deportation." *Molina-Camacho*, 393 F.3d at 940 (citing 8 U.S.C. § 1101(a)(47)(A)) (emphasis added). Based on this language, the government argued that "a finding [by an IJ] that an applicant is removable . . . is essentially equivalent to an 'order' of removability." *Id.* at 941. Because the IJ made such a finding before proceeding to grant relief from removal, the government argued, the effect of the BIA's decision was to reverse the grant of relief, but affirm the finding of removability, and thus, leave in place the "order of deportation" already entered by the IJ. *Id.*

The court, however was unpersuaded. It reasoned: "[a]ccepting the Government's interpretation of the interplay between a finding of removability and an actual order of removal would render the IJ's discretionary ability to literally 'cancel removal' meaningless, because a finding of removability in the first instance is a prerequisite to such relief." *Id.* (citing 8 U.S.C. § 1229b(b)(1)). The court added that the Government's argument was flawed "because it conflated the BIA's uncontested *substantive* power to reverse a finding of removability or eligibility for cancellation of removal with the *procedural* power to issue the order of removal that results from such a reversal." *Id.* The court also noted that the government was unable to point the court to any statutory authority or case law to "support [] the assertion that a finding that a petitioner is removable is the same thing as an order of removal." *Id.* Accordingly, the court concluded "that the BIA acted *ultra vires* in issuing a deportation order instead of remanding to the IJ"—rendering "that portion of the proceedings a legal nullity." *Id.* (internal quotation marks omitted).

The Eighth Circuit was next to address the question, reaching the opposite conclusion, in *Solano-Chicas v. Gonzales*, 440 F.3d 1050 (2006). Although the court acknowledged that the Ninth Circuit had been presented with "precisely the situation" before it, namely whether the BIA

could itself order an alien removed after reversing an IJ's grant of discretionary relief from removal, the Eighth Circuit "part[ed] ways with the Ninth Circuit" on the issue. *Id.* at 1053-54. The court began its analysis by noting that once a finding of removability has been made, an alien bears the burden of showing that he or she is eligible for relief from removal. *Id.* at 1054. From there, the court reasoned that if an alien failed to make that showing, "an order of removal is appropriately entered by the IJ, and becomes final, *inter alia*, upon an order from the BIA affirming the IJ's order." *Id.* Further, the court ruled that where the BIA reverses the IJ's order granting relief from removal, the BIA "gives effect to the IJ's order of removability, for the BIA decision eliminates the impediments to removal." *Id.* The court never directly equated a finding of removability with an order of deportation, but instead appeared to be motivated primarily by efficiency concerns. In the sentence immediately following its holding, the court stated: "It would be an imprudent expenditure of resources to require that the case nonetheless be remanded to the IJ for an actual order of removability to be entered." *Id.*

The court also believed the result of its holding to be "consistent with the intent of the Attorney General," as shown by a then-recent amendment to immigration regulations. The amendment forbade the BIA from "issu[ing] any decision affirming or granting to an alien an immigration status, relief, or protection from removal, or other immigration benefit . . . that requires completion of identity, law enforcement, or security investigations if" those investigations have not been completed, are no longer current, or have uncovered relevant information bearing on the alien's application. *Id.* (quoting 8 C.F.R. § 1003.1(d)(6)(i)) (internal quotation marks and emphasis omitted). Without discussing the regulations that affirmatively delineate the powers of the BIA, the Eighth Circuit declared that the recent amendment's language indicated that the BIA could itself *grant* relief to an alien.

The court thus concluded that the BIA's role "is not just one of merely affirming or reversing IJ decisions; it may order relief itself." *Id.* Accordingly, the court found it "entirely consistent that the BIA also may deny status and order an alien removed." *Id.* It affirmed the BIA's order removing the alien. *Id.* at 1056.

The Fifth and Second Circuits quickly lined up behind the Eighth Circuit in result, if not exactly in reasoning. In *Delgado-Reynua v. Gonzales*, 450 F.3d 596 (5th Cir. 2006), facing facts materially identical to the instant case, the Fifth Circuit joined the Eighth Circuit in concluding that the BIA "merely eliminated impediments to removal" when it reversed an IJ's grant of discretionary relief from removal and "effected the original removal order." *Id.* at 601 (internal quotation marks omitted). Unlike the Eighth Circuit, which focused primarily on efficiency concerns, the Fifth Circuit expressly relied on the statutory definition of "order of deportation" that extends the term to include "the order by the special inquiry officer . . . *concluding that the alien is deportable* or ordering deportation." *Id.* at 600 (quoting 8 U.S.C. § 1101(a)(47)). Based on that definition, the court ruled that "Delgado-Reynua was ordered removed from the United States in the first instance by the IJ . . . [and] [t]he BIA simply reinstated that determination[.]" *Id.* The court concluded, without elaboration, that its ruling "d[id] not offend the scope of the powers granted to the BIA by either Congress or the Attorney General." *Id.* at 601. The *Delgado-Reynua* court neither mentioned nor endorsed the Eighth Circuit's conclusion that the BIA could itself grant an alien relief.[4]

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[4] Indeed, the Fifth Circuit later rejected the government's argument that the BIA could itself order an alien removed when the IJ had not first found the alien removable. *See James v. Gonzales*, 464 F.3d 505, 514 (5th Cir. 2006) ("[T]he statutory framework of the INA conveys that only an IJ may enter an order of removal in the first instance.").

The Second Circuit reached the same conclusion in *Lazo v. Gonzales*, 462 F.3d 53 (2d Cir. 2006) (petition for certiorari, No. 06-935, filed Dec. 29, 2006). The Second Circuit agreed with the Fifth Circuit that the government's view—that the BIA did not exceed its authority by ordering aliens removed—was "compelled" by the statute's definition of "order of deportation." *Id.* at 54. The court ruled: "the statutory requirement of an order of removal is satisfied when . . . the IJ *either* orders removal or concludes that an alien is removable." *Id.* Thus, the court explained, the BIA merely "removed an impediment" to the IJ's *original* order of removal when it overturned the IJ's grant of relief. The *Lazo* court rejected *Molina-Camacho* because, the panel opined, that opinion "does not consider the statutory definition that equates a finding of removability with an order of removal." *Id.* at 55.

In the instant case, the Seventh Circuit cast its lot with the Second, Fifth, and Eighth Circuits, holding that the BIA may order an alien removed immediately when it reverses an IJ's grant of relief from removal. Specifically, the court concluded that the statutory definition of "order of deportation" meant that the IJ had entered an "order of deportation" when it found Guevara removable—an order that the BIA affirmed on appeal while at the same time reversing the IJ's grant of relief from removal. (Pet. App. 7a-8a.) In so doing, the court candidly acknowledged the existence of this irreconcilable and direct conflict: "Guevara cites a Ninth Circuit case holding that the BIA is restricted to affirming or reversing orders of removal, not issuing them in the first instance . . . But the Second, Fifth, and Eighth Circuits have held otherwise on this issue, and we agree with the conclusions of these circuits." (Pet. App. 7a.)

The conflict is thus squarely presented in this case, and is ripe for this Court's adjudication. Courts of appeals on both sides of the issue have carefully examined the relevant law, and have engaged a variety of interpretive tools to ascertain

the correct rule. Little would be gained from further percolation.

II. THE SEVENTH CIRCUIT'S HOLDING IS INCONSISTENT WITH THE STATUTORY AND REGULATORY SCHEME GOVERNING IMMIGRATION CASES.

Not only does the Seventh Circuit's opinion exacerbate a circuit split, it is also wrong because it is contrary to the language of the pertinent statutes and regulations.

To begin with, the BIA does not itself have the authority to enter an "order of deportation." The very statute defining that term clearly sets out who has the authority to enter such an order: "The term 'order of deportation' means the order of the special inquiry officer [now called the IJ], or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable . . . ." 8 U.S.C. § 1101(a)(47)(A). The statute thus puts the responsibility for entering such an order squarely in the IJ.

Nor is there any colorable argument that the BIA constitutes some "other . . . administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable." The BIA's limited powers are created by the Attorney General's regulations. Those powers do not include ordering aliens removed from the country. Although the BIA is permitted to *review* "judgments and all other issues in appeals from decisions of [IJ]s," 8 C.F.R. § 1003.1(d)(3)(ii), including "[d]ecisions of [IJ]s in removal proceedings," *id.* § 1003.1(b)(3), no regulation empowers the BIA to itself order an alien removed. To the contrary, by both statute and regulation, "[a]n [IJ] shall conduct proceedings to decide the inadmissibility or deportability of an alien." 8 U.S.C. § 1229a(a)(1); 8 C.F.R. § 1003.10 ("*Immigration judges* . . . shall exercise the powers and duties . . . regarding the conduct of . . . removal . . . .") (emphasis added); *see id.*

§ 1240.12(c) (granting the IJ the power to "direct [an alien's] removal"); *id.* § 1241.1 ("An order of removal *made by the immigration judge* . . . shall become final . . . [u]pon dismissal of an appeal by the [BIA] [or] . . . [u]pon expiration of the time allotted for an appeal if the respondent does not file an appeal within the time.") (emphasis added); *id.* § 1240.13(d) ("If the [IJ] decides that the respondent is removable and orders the respondent to be removed, the [IJ] shall advise the respondent of such decision . . .").

Perhaps because the governing scheme places the authority to enter an "order of deportation" so squarely in the hands of IJs, and not the BIA, the Seventh Circuit rested its conclusion on a legal fiction that the BIA was not entering an "order of deportation" in its own right, but, instead, simply affirming an "order of deportation" already entered by the IJ. The argument focuses on a different part of the definition of "order of deportation," which states that the term includes orders of an IJ "concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). It posits that the IJ's finding of removability is an order "concluding that the alien is deportable," and thus itself an "order of deportation." Accordingly, the argument goes, where an IJ has found an alien removable but granted relief from removal—and the BIA affirms the former finding but reverses the later grant of relief—the BIA is actually just "giv[ing] effect" to "the IJ's first holding—that of removability . . . ." (Pet. App. 8a.) (internal quotation marks omitted). There are at least two principal problems with this approach.

First, as the Ninth Circuit pointed out, it "conflate[s] the BIA's uncontested *substantive* power to reverse a finding of removability or eligibility for cancellation of removal on appeal with the *procedural* power to issue the order of removal that results from such a reversal." *Molina-Camacho*, 393 F.3d at 941. This is no mere technicality; it is a crucial question of institutional competence. The IJ, like a trial court, enters a judgment that is reviewed by the BIA.

When the IJ's judgment is that an alien can stay in the United States, *i.e. not* be deported, it is difficult to understand how, on an appeal from that order, the BIA can "affirm" an "order of deportation."

To the contrary, the role of the BIA in such an instance is akin to a federal appellate court reviewing a district court's judgment granting one party's motion for summary judgment (analogous to the alien's request to stay in the country) and denying the other party's cross-motion for summary judgment (analogous to the government's request that the alien be removed). As a technical matter, only the loser of the granted motion for summary judgment has standing to appeal the grant of the motion. Yet, on that appeal, the court is free to rule that the cross-motion should have been granted. *First Nat'l Bank v. Lincoln Nat'l Life Ins. Co.*, 824 F.2d 277, 281 (3d Cir. 1987). Strikingly, though, where the appellate court so rules, it does not simply enter judgment in favor of the appellant (and cross-movant) on its own. Instead, it "remand[s] with directions that [the trial court] enter summary judgment for" for the appellant. *Id.* This is consistent with federal law, which does not permit an appellate court to enter a new judgment in the first instance, but instead requires "*remand*[*ing*] the cause and *direct*[*ing*] the entry of such appropriate judgment, decree, or order . . . " 28 U.S.C. § 2106 (emphases added).

Indeed, remand is perhaps even more necessary in the context of removal proceedings, because unlike cross-motions for summary judgment—where issues are joined and the trial court need merely pick which party's argument is correct—it is quite easy to imagine a situation in removal proceedings where the IJ had several reasons for his decision to allow the alien to stay in America, yet only reached one. Reaching every reason would be unnecessary if the IJ had already made a dispositive ruling. In such cases, the United States Courts of Appeals and this Court have been quick to recognize that remand is appropriate, so that the trial court can consider the remaining questions, especially if the

appellate court's ruling changes a portion of the trial court's analysis. *See, e.g.*, *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1478 (Fed. Cir. 1998) (noting "the general rule that an appellate mandate governs only that which was actually decided"); *see also Fountain v. Filson*, 336 U.S. 681, 683 (1949) ("One of the reasons for [our holding that an appellate court could not grant judgment notwithstanding the verdict when the losing party had not moved for that relief before the trial court] was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case.").

Second, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and "a court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted). The Seventh Circuit's approach violates this basic rule; equating a finding of removability with an order of deportation cannot be reconciled with the remainder of the statutory and regulatory immigration scheme.

For example, 8 U.S.C. § 1229a(c)(5) states that "[i]f the immigration judge decides that the alien is removable *and* orders him removed" (which itself confirms that a finding of removability and an order of removal are distinct), the IJ must "inform the alien of the right to appeal that decision and the consequences for failure to depart under the order of removal, including civil and criminal penalties" (emphasis added). This warning would make no sense if applied to a finding that an alien is removable, when the IJ expects to conduct further proceedings to determine whether the alien merits relief from removal. *See also* 8 C.F.R. § 1240.13(d) (requiring warnings regarding penalties for failure to depart when ordering an alien removed).

That a finding of removability and the entry of an order of removal are two separate things is further emphasized by 8 C.F.R. § 1240.12, which requires the decision of the IJ to "include a finding as to inadmissibility or deportability" and "conclude[] with the order of the [IJ]," *id.* § 1240.12(a)—and that the order of the IJ shall, where appropriate, "direct the respondent's removal from the United States," *id.* § 1240.12(c). Indeed, under 8 C.F.R. § 1240.12(d), "[w]hen [an alien] is ordered removed from the United States, the [IJ] shall identify a country, or countries in the alternative, to which the alien's removal may in the first instance be made[.]" Of course, when an IJ has merely found an alien removable, but has granted relief from removal and is ordering that an alien may stay in the United States, the IJ would not specify a country to which to remove the alien.

In addition, as the Ninth Circuit recognized in the seminal case on this issue, "[a]ccepting the government's interpretation of the interplay between a finding of removability and an actual order of removal would render the IJ's discretionary ability to literally 'cancel removal' meaningless, because a finding of removability in the first instance is a prerequisite to such discretionary relief." *Molina-Camacho*, 393 F.3d at 941 (citing 8 U.S.C. § 1229b(b)(1)).

These inconsistencies can all be avoided very simply: by refusing to conflate the BIA's substantive power to reverse an IJ's finding that an alien is eligible for relief from removal with the procedural power to order an alien removed. *See id.* The Seventh Circuit's failure to do so renders its decision erroneous.

III. THE SEVENTH CIRCUIT'S OPINION THREATENS SUBSTANTIAL CONFUSION REGARDING THE PROPER APPELLATE PROCEDURE FOR IMMIGRATION CASES.

Finally, and perhaps most importantly, the logic of the Seventh Circuit's holding (and the majority rule) create the

potential for mass confusion and needless piecemeal proceedings in removal cases.

As set out above, a finding of removability is a threshold question, often conceded in removal cases at an early stage. Most often, the "action" in such cases centers on the separate question of relief from removal, which generally is adjudicated later—often much later. Removal Hearing Fact Sheet at 2; 8 C.F.R. 1240.48(a); *see also* SJ080 ALI-ABA at 218 (noting that a request for relief from removal generally requires a "separate 'merits' hearing").

If a simple finding of removability, without more, constitutes an "order of deportation," the right to appellate review by the BIA would attach instantly. The alien would have to appeal that order to the BIA or risk that order becoming a final order of deportation within 30 days. 8 U.S.C. § 1101(a)(47)(B); 8 C.F.R. § 1003.39. Two results are possible under such a scheme; neither is desirable.

First, aliens might fail to appeal the finding of removability, only to find out that, under the logic of the Seventh Circuit's approach, the earlier finding was actually an "order of deportation," which became final 30 days after entry when not appealed.[5] At a minimum, the alien could

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[5] In fact, there is currently some confusion in the United States Courts of Appeals regarding whether an immigration judgment is "final" and "exhausted," *i.e.*, reviewable in federal court, in cases where the BIA reverses a grant of discretionary removal but remands the case to the IJ.

The Eleventh Circuit's case in *Del Pilar v. United States Attorney General*, 326 F.3d 1154 (11th Cir. 2003), is one example of the confusion. In that case, an IJ found Del Pilar removable, then granted him a waiver of inadmissibility. The BIA reversed the IJ's grant of relief and remanded to the IJ for the limited purpose of allowing Del Pilar to designate a country of removal. *Id.* at 1156. Del Pilar appealed directly from the BIA to federal court. The government argued that the remand rendered the judgment non-final, stripping federal courts of jurisdiction. *Id.* The Eleventh Circuit disagreed, finding that despite the remand, the BIA order of removal was final and the court had jurisdiction to hear the

lose the right to BIA review of that order by not having timely appealed it. *See* 8 C.F.R. § 1003.38(b); *id.* § 1003.3(a)(1). But the result could be far worse: an alien could lose the opportunity to have the merits of his claim heard before being deported from the country. For, once the order of deportation becomes final, the alien is to be detained and removed within 90 days. 8 U.S.C. § 1231(a)(1), (2). Should a finding of removability be thus converted to a final order of removal for a legitimate refugee, under the majority rule's logic, this ambiguity in immigration procedure could become literally a matter of life and death, with neither BIA review, nor Article III review, nor even habeas corpus, available for an alien who falls victim to it. *See* 8 C.F.R. § 1003.3(a)(1); *id.* § 1003.39; 8 U.S.C. § 1252(d)(1) (Article III court may not consider immigration claims not first exhausted before the BIA); 8 U.S.C. § 1252(a)(5) (withdrawing habeas corpus review for "an order of removal").

Second, to avoid this result, aliens might wisely decide to appeal the preliminary finding of removability, even before

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case. *See also Perez-Vargas v. Gonzales*, 478 F.3d 191, 194 n.4 (4th Cir. 2007) ("The BIA's opinion, read as a whole, indicates that the remand to the IJ was for the purpose of determining whether Perez-Vargas is entitled to voluntary departure. In such circumstances, there is a final order of removal for purposes of appeal[.]"); *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995) (holding that court had jurisdiction, although alien appealed directly from a BIA decision that remanded the case to the IJ).

The confusion also extends to what precisely is required to exhaust administrative remedies. In *Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005), the Third Circuit entertained an appeal after the IJ issued a final order on remand from the BIA. In so doing, the court rejected the government's argument that the petitioner had not exhausted his administrative remedies for failing to appeal the decision on remand to the BIA. *See also Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994) (rejecting government's argument that alien did not exhaust administrative remedies because he did not appeal to BIA after remand).

an IJ has decided whether they will be granted relief from removal. The result would be to inundate an already-deluged BIA with up to double the normal number of appeals in removal cases.[6] Such early appeals could potentially extend the time to adjudicate removal cases significantly; the IJ might lose the practical ability to proceed to the question of relief from removal, since federal regulations require that "[i]f an appeal is taken from a decision of an [IJ], the record of the proceeding shall be forwarded to the Board upon the request or the order of the Board." 8 C.F.R. § 1003.5(a).

Even if that problem could be remedied, such that IJ proceedings could continue after a preliminary BIA appeal, however, other problems arise. Many of these preliminary appeals could be mooted by an IJ's later grant of relief from removal. In such cases, the alien's time would be wasted in preparing and filing the premature appeal, the government's time would be wasted in responding to it, and the BIA's time would be wasted in administering it.

Alternatively, a later denial of such relief by an IJ (and concomitant order that the alien be removed) could give rise to a second appealable "order of deportation." Because the BIA has no mechanism to consolidate appeals comparable to that available in the federal circuit courts, *see* 8 U.S.C. § 1252(b)(6), the two appeals in one case would proceed on separate tracks to adjudication, potentially resulting inconsistent results—for example, where the first appeal is

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[6] At the end of Fiscal Year 2006, there were 27,918 pending cases before the BIA. OFFICE OF PLANNING, ANALYSIS, & TECHNOLOGY, UNITED STATES DEP'T OF JUSTICE, FY 2006 STATISTICAL YEARBOOK U1 (2007), *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf (last visited April 6, 2007). Moreover, while the number of cases initiated with the BIA *increased* 14% from Fiscal Year 2002 to Fiscal Year 2006, the number of cases that the BIA completed *declined* by 12% in that same time period. *Id.* at S1.

affirmed, resulting in an order that an alien be removed, and the second appeal is reversed, resulting in an order that an alien be permitted to stay, or at least an order remanding the case for further proceedings. Two BIA rulings, in turn, could translate to two petitions for Article III review per case as well, exacerbating an already-crushing volume of petitions for review of BIA orders filed in the U.S. Courts of Appeals.[7]

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[7] As one commentator notes:

> Whereas the Second Circuit had rarely ever received more than thirty [petitions for review of BIA decisions] in any given month before 2002, filings began to rise dramatically that year. Between April 2002 and September 2005, the court received more than three times as many petitions for review of BIA decisions as it had received during the previous thirty years combined. Similar increases have been felt in courts of appeals around the country, with the heaviest volume in the Second and Ninth Circuits.

John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. SCH. L. REV. 13, 14 (2007) (footnotes omitted). The commentator further notes that "[o]bservers generally agree that the surge is closely linked to recent procedural changes at the BIA, which substantially increased the volume of decisions reached by that tribunal, and led litigants to appeal those decisions at a higher rate." *Id.* at 15.

A simple calculation demonstrates the potential impact. The Ninth Circuit, which does not follow the majority rule encouraging duplicative appeals, currently handles approximately 49% of petitions for review of BIA decisions. *See, supra*, JUDICIAL BUSINESS OF THE UNITED STATES COURTS at Table B-3. These petitions comprise 40% of the court's caseload. *See id.* Put differently, they account for an average of over 225 cases, per active judge, per year. *See id.*; United States Court of Appeals for the Ninth Circuit, The Judges Of This Court In Order Of Seniority, *available at* http://www.ca9.uscourts.gov/ ca9/ Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f664 08825683c0058477e?OpenDocument (last visited April 6, 2007). If the court had to deal with twice the number of petitions for review of BIA decisions, those petitions alone would account for over 550 cases, per active judge, per year.

Again, all of these potentially adverse consequences could be averted by a simple ruling from this Court, clarifying that an "order of deportation" comes only from an IJ, and only when the IJ orders that an alien actually be removed. For these reasons, too, certiorari here is appropriate.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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April 9, 2007

United States Court of Appeals,Seventh Circuit.

Eusebio GUEVARA, Petitioner,

v.

Alberto R. GONZALES, Respondent.

No. 05-2696.

Argued March 31, 2006.

Decided Jan. 8, 2007.

Before ROVNER, EVANS, and SYKES, Circuit Judges.

SYKES, Circuit Judge.

Eusebio Guevara, a citizen of Honduras, petitions for review of a decision of the Bureau of Immigration Appeals ("BIA") reversing an immigration judge's ("IJ") discretionary grant of a waiver of removal under 8 U.S.C. § 1182(c). Guevara argues that the BIA applied the wrong standard of review and exceeded its authority by ordering his removal from the United States. We deny the petition for review.

I. Background

Guevara is a Honduran who legally entered the United States in 1985 and became a lawful permanent resident in 1990. In 1991, while living in California, he was convicted of retail theft after he shoplifted a pair of pants. In 1996, while living in Wisconsin, he was convicted of two counts of fourth-degree sexual assault in violation of section 940.225(3m) of the Wisconsin Statutes and sentenced to 63 days' imprisonment and 18 months of probation. In June 2004 Guevara left the United States to visit family in Honduras. Upon his return a month later, he was placed in removal proceedings pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) as an alien removable for having been convicted of a crime involving moral turpitude.

An IJ found Guevara removable based upon his sexual assault convictions. Guevara sought a discretionary

waiver of removal on the grounds of rehabilitation and economic hardship pursuant to the now-repealed 8 U.S.C. § 1182(c). This section, commonly referred to as § 212(c),[1] was repealed by the Immigration Reform and Immigrant Responsibility Act of 1996, but its repeal was subsequently held to be inapplicable to aliens, like Guevara, whose convictions were obtained by guilty plea prior to the Act's effective date of April 1, 1997. *INS v. St. Cyr,* 533 U.S. 289, 318-25, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (holding that the repeal of § 212(c) had an impermissibly retroactive effect on aliens who pleaded guilty prior to the Act's effective date). Section 212(c) permitted certain classes of permanent resident aliens, otherwise removable, to be admitted "in the discretion of the Attorney General" if they were returning from a temporary and voluntary journey abroad to a "lawful unrelinquished domicile of seven consecutive years." Guevara's eligibility to seek a § 212(c) waiver is not at issue here.[2]

After a hearing at which Guevara was the only witness, the IJ weighed the positive and negative equities presented by the case and elected to grant Guevara a discretionary § 212(c) waiver of removal. The government appealed to the BIA, which adopted the IJ's findings of fact but reversed his weighing of the factors pertaining to the discretionary waiver of removal. The BIA concluded that the negative equities outweighed the positive to the extent

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[1] The former 8 U.S.C. § 1182(c) was § 212(c) of the Immigration and Nationality Act of 1952.

[2] The Department of Homeland Security has promulgated a rule limiting the discretion of IJs to grant § 212(c) waivers in certain instances, but the government does not contend that Guevara falls within any of the enumerated categories that would render him ineligible to invoke the protections of the repealed section. *See* 8 C.F.R. § 1212.3. For further restrictions on the eligibility for a § 212(c) waiver not applicable here, see *Matter of Blake,* 23 I. & N. Dec. 722 (BIA 2005).

that Guevara should not receive a discretionary waiver. The BIA did not remand the matter to the IJ for further action; instead, the BIA's decision included an order removing Guevara from the country.

In his petition for review, Guevara argues that the BIA exceeded its legal authority in two ways. First, he contends the BIA applied the wrong standard of review when it reversed the IJ's discretionary grant of the § 212(c) waiver. Second, he contends the BIA was not authorized to order him removed from the country when such an order was not first entered by the IJ.

II. Discussion

A. Discretionary Grant of § 212(c) Waiver of Removal

Subject to certain exceptions not pertinent here, this court has no jurisdiction to review the merits of the BIA's exercise of discretion. 8 U.S.C. § 1252(a)(2)(B); [3] *see Jarad v. Gonzales,* 461 F.3d 867, 869 (7th Cir.2006). Further, under 8 U.S.C. § 1252(a)(2)(C), "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2)," the section applicable to Guevara's case. Recognizing these jurisdictional limitations, Guevara characterizes his first argument as a challenge to an error of law on the part of the BIA, which is reviewable pursuant to 8 U.S.C. § 1252(a)(2)(D) notwithstanding the limitations just mentioned. Specifically, Guevara argues that the BIA applied an incorrect standard of review in reversing the IJ's decision granting the waiver of removal.

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[3] This section provides in pertinent part that "no court shall have jurisdiction to review ... any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security."

Pursuant to 8 C.F.R. § 1003.1(d)(3), an IJ's findings of fact are subject to a clearly erroneous standard of review by the BIA, but "the Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges de novo." Guevara claims the BIA improperly rejected facts found by the IJ by failing to apply the clearly erroneous standard of review. This argument rests on a misreading of both the IJ's decision and the BIA's.

The IJ's decision lists what he identified as the positive and negative factors in Guevara's case that should be balanced in the exercise of discretion under § 212(c).[4] The negative factors weighing against a waiver were Guevara's criminal convictions-especially the more serious sexual assault convictions-and his denial before the IJ that he actually committed the sexual assaults. On this latter point, Guevara acknowledged at his hearing that he pleaded guilty to the sexual assault charges but said he did so on the advice of his attorney; he denied that he actually committed the offenses. The IJ identified the following positive factors: the duration of Guevara's residence in the United States (over nineteen years at the time of decision), his steady employment during that time, the lack of any criminal convictions in the eight years following his sexual assault convictions, his credible expression of remorse for his crimes,[5] and the economic difficulties that would accompany Guevara's return to Honduras. The IJ concluded that "the

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[4] The IJ's identification of the factors pertinent to the balancing of equities was drawn from the BIA's decisions in *Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990), and *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

[5] The IJ's finding that Guevara was remorseful is difficult to reconcile with Guevara's denial that he committed the sexual assaults, which the IJ identified as a negative factor that weighed against a discretionary waiver of removal.

equities do outweigh the negative factors represented by his convictions." With respect to the passage of time since Guevara's last criminal conviction, the IJ held as follows:

> The record indicates that he has not been convicted of any crime since 1996. I think, therefore, that it can be said that the respondent has been reformed so that he has chosen a way of life where future criminal misconduct is unlikely because he has not been involved in criminal misconduct since his November of 1996 conviction.

On appeal, the BIA addressed both the IJ's factfinding and his balancing of the pertinent factors as follows:

> In accordance with *Matter of Marin,* 16 I & N Dec. 581 (BIA 1978), the Immigration Judge sufficiently set forth the positive and negative factors presented in this case. We adopt those findings [citation omitted]. However, upon weighing those factors, we agree with the DHS that the respondent does not merit a discretionary grant of a section 212(c) waiver. *See Matter of Buscemi,* 19 I & N Dec. 628 (BIA 1988). We acknowledge the difficult conditions in Honduras, the respondent's long residence in the United States, his employment history, and the financial support he provides his family. *In this case, we consider rehabilitation to be a neutral factor.* On the one hand, 9 years have passed since the respondent's criminal conduct. On the other hand, he still has not fully acknowledged his wrongdoing. All in all, the seriousness of the respondent's sexual assault convictions, as well as the circumstances of those offenses, outweigh the favorable equities in this case.

(Emphasis added.)

The issue Guevara raises here centers on the sentence we have emphasized in the paragraph quoted above from the BIA's decision. Guevara argues that the IJ found as a matter of fact that he had "reformed" or "rehabilitated" himself in the years following his conviction and the BIA

failed to apply the clearly erroneous standard of review to that finding. According to Guevara, the BIA simply disagreed with the IJ's finding of rehabilitation and rejected it out of hand, rather than finding it to be clearly erroneous under the more demanding standard of review applicable to an IJ's factfinding. The government responds that the BIA did not reject the IJ's factfinding but simply concluded that the IJ had given the matter of rehabilitation too much weight when balancing the equities.

We do not read the BIA's decision as a rejection of the IJ's factfinding on rehabilitation; to the contrary, the decision specifically adopted the IJ's findings on the positive and negative factors in Guevara's case. Rather, the BIA reweighed the positive and negative factors and concluded that rehabilitation was a neutral factor rather than a positive one. The BIA determined that the IJ had given undue weight to Guevara's rehabilitation vis-à-vis the negative factors in his case. The relative weight of Guevara's rehabilitation in the balancing process is not "factfinding" subject to the clearly erroneous standard of review; it is a matter of discretion and judgment and is subject to de novo review by the BIA. Accordingly, the BIA did not apply the incorrect standard of review in reversing the IJ's discretionary grant of the removal waiver.

B. The BIA's Order of Removal

Guevara next argues that the Board had no authority to order his removal from the country when no such order had been entered in the first instance by the IJ. The IJ held that Guevara was "subject to removal" pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) by virtue of having committed a crime of moral turpitude. However, the IJ did not order Guevara's deportation-notwithstanding his removability-but instead granted the discretionary waiver of removal discussed above. The BIA, having concluded on appeal that the IJ improperly balanced the equities in making the waiver decision, reversed the discretionary grant of relief and ordered Guevara

"removed from the United States to Honduras." Guevara now argues that the power to enter such an order rests solely with the IJ and not the BIA. In support of his argument, Guevara cites a Ninth Circuit case holding that the BIA is restricted to affirming or reversing orders of removal, not issuing them in the first instance. *Molina-Camacho v. Ashcroft,* 393 F.3d 937, 940 (9th Cir.2004).

But the Second, Fifth, and Eighth Circuits have held otherwise on this issue, and we agree with the conclusions of these circuits. *See Lazo v. Gonzales,* 462 F.3d 53, 54-55 (2d Cir.2006); *Delgado-Reynua v. Gonzales,* 450 F.3d 596, 600-01 (5th Cir.2006); *Solano-Chicas v. Gonzales,* 440 F.3d 1050, 1054 (8th Cir.2006). As recognized in these opinions, the conclusion that the BIA has the authority to enter the order it did in Guevara's case flows from the definition of "order of deportation" contained in the Immigration and Naturalization Act: "The term 'order of deportation' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, *concluding that the alien is deportable* or ordering deportation." 8 U.S.C. § 1101(47)(A) (emphasis added).

This section also provides that an "order of deportation," as defined above, "shall become final upon the earlier of a determination by the Board of Immigration Appeals affirming such order" or the expiration of the time to appeal to the BIA. 8 U.S.C. § 1101(47)(B). For purposes of this section, the phrase "special inquiry officer" is synonymous with an IJ, *see* 8 C.F.R. § 1.1(l), and the phrase "deportable" is synonymous with the term "removable," *see Evangelista v. Ashcroft,* 359 F.3d 145, 147 n. 1 (2d Cir.2004); *Avila-Macias v. Ashcroft,* 328 F.3d 108, 111-12 (3d Cir.2003). Thus, if an IJ decides that an alien is removable but does not ultimately order removal due to a grant of a waiver, cancellation, or the like, the decision that the alien is removable is nonetheless an "order of

deportation" that may be affirmed by the BIA. *See Solano-Chicas,* 440 F.3d at 1054 ("Thus, it follows that where the BIA reverses the IJ's order granting cancellation of removal, the BIA, in essence, gives effect to the IJ's order of removability, for the BIA decision eliminates the impediments to removal."); *Lazo,* 462 F.3d at 54 ("[T]he BIA did not 'order' Lazo's removal (as Lazo characterizes the order); the BIA has removed an impediment to the removal that was ordered by the IJ."); *Delgado-Reynua,* 450 F.3d at 601 ("We join the Eighth Circuit in concluding that where the BIA reverses an IJ's grant of discretionary relief and gives effect to the IJ's original order of removability, the BIA has merely eliminated 'impediments to removal' and effected the original removal order.").

In Guevara's case, the IJ initially determined that Guevara was removable for having committed a crime involving moral turpitude. Pursuant to 8 U.S.C. § 1101(47)(A), this threshold determination constituted an order of deportation (i.e., removal) that could be given effect by the BIA once it reversed the IJ's subsequent conclusion that Guevara was entitled to a discretionary waiver of removal pursuant to § 212(c). In other words, the BIA rejected only the waiver determination in the IJ's decision, leaving the IJ's first holding-that of removability-intact. The BIA was thus empowered to order Guevara removed to Honduras.

The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A91 816 037 – Chicago Date: MAY 17, 2005

In re: EUSEBIO GUEVARA

IN REMOVAL PROCEEDINGS

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] – Crime involving moral turpitude

APPLICATION: Section 212(c) waiver

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals the Immigration Judge's December 6, 2004, decision granting the respondent a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (repealed 1996). The respondent has filed an opposition. Both parties filed supplemental briefs following the Board's recent decision in *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005). The appeal will be sustained.

The respondent is a native and citizen of Honduras. He adjusted his status to lawful permanent resident in 1990. On July 9, 1991, the respondent was convicted upon a plea of guilty in a California State court to one count of petty theft in violation of Cal. Penal Code §§ 484, 488 (West 1991). He was sentenced to 1 day in jail and 3 years of

probation. On November 27, 1996, the respondent was convicted in a Wisconsin State court upon a plea of no contest to two counts of fourth-degree sexual assault in violation of Wis. Stat. § 940.225(3m) (1996). He was sentenced to 63 days in prison and concurrent 18-month periods of probation.

On appeal, the DHS challenges the respondent's statutory eligibility for section 212(c) relief with respect to his sexual assault convictions, as well as the Immigration Judge's exercise of discretion to grant such relief. First, we conclude that the respondent is statutorily eligible for section 212(c) relief. Having entered his plea agreement between April 24, 1996, and April 1, 1997, the respondent is eligible to apply for relief under section 212(c) of the Act "as amended by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996." 8 C.F.R. § 1212.3(h)(2). As so amended, section 212(c) of the Act does "not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241 (a)(2)(A)(iii), (B), (C) or (D)" of the Act. Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132,110 Stat. 1214, as amended by section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208,110 Stat. 3009-546. To be deemed one who "is deportable" under the amendment to section 212(c) of the Act, the alien must be charged with and found deportable on one of the grounds specified in the amendment. *Matter of Fortiz*, 21 I&N Dec. 1199, 1201 n.3 (BIA 1998); *see also* 8 C.F.R. § 1212.3(f)(4). In this case, as an arriving alien the respondent was charged with removability under section 212(a) of the Act. He has not been charged with removability under section 237(a)(2)(A) of the Act, 8 U.S.C. § 1227(a)(2)(A), which is the successor statute to former section 241(a)(2)(A) of the Act, 8 U.S.C. § 1231(a)(2)(A)(i). He therefore has not been rendered "deportable" as a result of his conviction. *Matter of Fortiz, supra*; *see also Matter of*

Fuentes-Campos, 21 I&N Dec. 905 (BIA 1997). Accordingly, he remains eligible to seek a section 212(c) waiver.

Similarly, disposition of this case is not affected by our holding in *Matter of Blake, supra*, because the respondent has not been charged with removability as an aggravated felon. For these reasons, we conclude that the respondent is statutorily eligible for section 212(c) relief. Accordingly, we must address the Immigration Judge's exercise of discretion.

In accordance with *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978), the Immigration Judge sufficiently set forth the positive and negative factors presented in this case. We adopt those findings (I.J. at 5-6, 9-11). However, upon weighing those factors, we agree with the DHS that the respondent does not merit a discretionary grant of a section 212(c) waiver. See *Matter of Buscemi*, 19 I&N Dec. 628 (BIA 1988). We acknowledge the difficult conditions in Honduras, the respondent's long residence in the United States, his employment history, and the financial support he provides his family. In this case, we consider rehabilitation to be a neutral factor. On the one hand, 9 years have passed since the respondent's criminal conduct. On the other hand, he still, has not fully acknowledged his wrongdoing. All in all, the seriousness of the respondent's sexual assault convictions, as well as the circumstances of those offenses, outweigh the favorable equities in this case. Accordingly, the DHS's appeal will be sustained.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The respondent is ordered removed from the United States to Honduras.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File No.: A 91 816 037

December 6, 2004

In the Matter of	)	
EUSEBIO GUEVARA	)	IN REMOVAL PROCEEDINGS
	)	
Respondent		

CHARGE: Section 212(a) (2) (A) (i) - convicted or having committed or committing acts which constitute the essential elements of the crime involving moral turpitude.

APPLICATIONS:
212(c) waiver.

ON BEHALF OF RESPONDENT:
Claudia Valenzula, Esquire

ON BEHALF OF DHS:
John Gountanis, Esquire

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 45-year-old married male who is a native and citizen of Honduras. He was placed in proceedings when he attempted to enter the United States on

July 9, 2004 at Milwaukee International Airport. A Notice to Appear was issued on September 13, 2004, and directed to the Chicago Immigration Court. The respondent acknowledged having received it, and acknowledged that he was properly served.

The respondent has pled to the allegations in the Notice to Appear admitting allegations one through five. Specifically he admits that he is not a citizen of this country, rather, he is a citizen of Honduras, and he was admitted or adjusted to the United States as a permanent resident on December 1, 1990. He also admits that he presented himself for inspection initially on July 9, 2004, and later on September 8, 2004 at Milwaukee, Wisconsin. The respondent denied that he was convicted of petty theft on July 9, 1991 in San Diego, California, or that he was convicted on November 27, 1996 of fourth degree sexual assault in Wisconsin. He also denies that he is subject to expulsion on the charge.

Notwithstanding the respondent's denials, the Department of Homeland Security has presented conviction records evidencing the respondent's convictions. For example, in Exhibit 2, the conviction records show that the respondent pled guilty, and then was found guilty on November 27, 1996 of fourth degree sexual assault. It indicates that Eusebio Guevara was convicted of that crime which is a misdemeanor under the law of Wisconsin. And he further indicates that he was placed on probation for a period of 18 months.

In addition, page 17 of Exhibit 2 indicates the respondent pled guilty to a misdemeanor of retail theft in San Diego County. The respondent has testified today that he was convicted of that offense. I find, therefore, that the conviction records do establish that the respondent was convicted of the offenses indicated in his Notice to Appear. I specifically find that his conviction of fourth degree sexual

assault constitutes a crime involving moral turpitude rendering him subject to removal.

Although the charge was contested, the principal issue in this case is really the respondent's eligibility for 212(c) waiver. The respondent contends that he is eligible for the waiver because his convictions occurred prior to April 1, 1997. He contends that he pled guilty, that the plea agreement was reached prior to the date indicated in the regulation, and that the regulation does provide for his eligibility insofar as he does not fall within any of the prescribed provisions. The Department, in contrast, contends that the regulation does not apply to him, that he does not fall within the regulation because he was seeking admission and out of the United States when he returned.

I find that the regulation which took effect in October of 2004 does apply to the respondent. I reach that conclusion for a number of reasons. First, the respondent did enter into a plea, did enter a plea of guilty, between April 24, 1996 and April 1, 1997. The respondent and is a permanent resident. The regulation specifically applies to such an individual. The respondent does not fall within any of the prescribed provisions or conditions contained in the regulations under Subsection 3, Subsection 4 and 5, listing those bars, namely alien who is subject to inadmissibility under paragraphs 3-A, 3-B, 3-C, 3-E, alien who has been convicted of one or more aggravated felonies, et cetera, an alien is not ineligible for 212(c) relief on account of an aggravated felony conviction pursuant to a plea agreement. He does not fall within any of those. In addition, I note that the response to the comments received, page 57828 of the regulations, column 1, specifically refer to the purpose of the regulations as to provide for 212(c) eligibility for aliens who are permanent residents, but not to allow those aliens who have been deported or removed from the United States to return to the United States after leaving or being expelled under a final order of removal to pursue 212(c) claims. However, that is not the case here. The respondent has not

been ordered removed or has not departed under an order of removal and then sought to return to the United States. In contrast, this alien was seeking to return to the United States as a permanent resident earlier this year and was then placed in proceedings. So I do find that the respondent's situation, namely permanent resident who had never had an opportunity to present a waiver under 212(c) who became a permanent resident in 1990 through adjustment of status, who was convicted of crimes before April 1, 1997, and whose last conviction was pursuant to a plea agreement entered into in November of 1996, is covered by the regulation. See the regulation entitled Executive Office for Immigration Review, Section 212(c) relief for aliens with certain criminal convictions before April 1, 1997, 8 C.F.R. Parts 1003, 212, 1212, and 1240.

In regard to whether the respondent should be granted the waiver, I note that the following testimony and evidence is of significance. First, the respondent testified today that he is 44 years of age, that he is married, born in Honduras, that his wife and all but one child are in Honduras.[1]

He testified that he entered the United States in 1985, that he legally entered at that time. He worked in agriculture and was able to obtain a temporary resident status in 1988, and then permanent residence under the Special Agricultural Worker provision of Section 210 in 1990 when his status was adjusted.

He testified that he has made five trips out of the United States, and he further testified in the last departure he went back because of the illness of one of his children. He stayed there for seven months.

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[1] I note that the respondent states on his I-191 he was born 8/14/59. That would make him 45 years old.

He testified that he was convicted of stealing a pair of pants in San Diego. He stated that he regretted doing that, and then he completed his probation successfully for it.

He also stated that he was convicted of sexual abuse in 1996. His version of the incident is presented in his testimony. He stated that a girl called the police. The girl was the child of his girlfriend, that he was staying at her house. He described his girlfriend as "Baby Harrison." He admitted on cross-examination that he returned to live with her briefly after his conviction and release from prison, but has not seen her for the last six or seven years. The respondent further testified that he pled guilty, but denies that he ever touched the child in any way. He claims that the agreement to plead guilty was the result of a discussion that he had with his attorney. Nonetheless, he states that he regrets the incident.

The respondent maintains that he has not been convicted of any other crimes since his conviction of sexual abuse in 1996. He claims that the economic situation in Honduras is dire, that there is no work for him there, that any jobs that are there would require heavy lifting which he is not capable of. He claims that he has visited Honduras to visit his family, and that regularly sends them money to support them. He claims that he has been paying taxes on his income in the United States.

I have considered this testimony as well as the statements that the respondent has presented in his support. Some of the statements indicated that the respondent was involved in charitable work for those victims of Hurricane Mitch in Honduras. See Exhibit No. 4. See also the letter from the respondent's sister in his support.

The Department has expressed opposition to the respondent's waiver not only on statutory grounds, that is he does not qualify for the regulation, but also on other

grounds.[2] Apart from the question of statutory ineligibility, there is a dispute concerning whether the respondent merits the relief. The Department contends that the respondent has not shown rehabilitation, that there are no favorable or positive factors in this case, that his son never appeared to testify on his behalf, although he is in the United States, that the respondent, although citing conditions in Honduras, and the existence of TPS there, would not be eligible for TPS if he applied because of his conviction of an aggravated felony, and, further, that the respondent regularly visits Honduras and is going to be sent back to the same country where his family is living. In contrast, he has never admitted his culpability of his offense.

I agree that the criteria to be considered is set forth in Matter of Marin, a 1976 BIA decision in which the Board listed both favorable and unfavorable factors. In subsequent cases, the Board held that the favorable factors may have to reach the level of unusual or outstanding equities if because of the nature or the seriousness of the offense such equities are required, but under Matter of Edwards, the Board held that these are not to be considered a threshold requirement.

The negative factors clearly are the respondent's conviction, the retail theft conviction initially, and then the sexual abuse in the fourth degree in November of 1996. The nature of the offense and the items stolen in San Diego indicate that this was not a serious offense. First of all, it is a misdemeanor. Secondly, the amount involved, a pair of pants, jeans, had relatively little value, and there is no indication that the respondent was involved in a pattern of

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[2] It is agreed by all concerned that the respondent is not eligible for a 240A (a) waiver insofar as his crime, sexual abuse in the fourth degree, did involve a minor, that is a young woman, and, thus, he is ineligible for cancellation of removal because he has been convicted of a crime involving sexual abuse of a minor which is an aggravated felony under Section 101(a)(43)(A) of the Act.

stealing which culminated in this conviction. Certainly the Court imposed only probation on him, and, consequently, there is no indication that the Court who sentenced him in San Diego considered this to be a serious offense. However, the sexual abuse crime is certainly more serious. The respondent pled guilty to abusing a minor, a young girl. The conviction record indicates that he did plead guilty to that offense, and the offense requires for a conviction under Wisconsin State law that he has contact with a person without the consent of that person, and if so, is guilty of a Class A Misdemeanor. I do not credit the respondent's testimony that he did not understand the reason why he pled guilty to the offense. The respondent was represented by counsel. He has not challenged the conviction subsequent to pleading guilty to the offense, and accept the sentence imposed by the Court without appealing. I consider it established that the respondent did, in fact, have sexual contact with a young female. Considering that the respondent has abused a young female, he has, in fact, been convicted of a crime involving sexual abuse of a minor, and, therefore, an aggravated felony. I think he has to show equities which rise to a fairly significant level in order to merit the granting of relief.

The significant factors or equities in the respondent's case are, of course, the duration of his presence in the United States. He has been in the U.S. for 19 years, that is since 1985 when he entered. He has been a permanent resident for over 14 years, and he has lived in the United States throughout that time, although his family is in Honduras. I think the duration of his residence is a very strong, favorable factor in his case. The respondent has been working in the United States apart from his conviction of retail theft, a misdemeanor, and also sexual abuse in the fourth degree, also a misdemeanor, he has not had any convictions in the last eight years. He has also been employed during that time.

I do not agree with the Department's contention that his trips to Honduras mean that he is, if sent back there, in a

situation which is not much different from that of being in the United States, or that sending him back to Honduras would have no consequences on his family there. Only on a superficial level would it reunite him with his family. Clearly the respondent has maintained throughout, not only the documents filed, but in his testimony, that his presence in the United States is to work and to support his family in Honduras. He has pointed out how difficult the situation for finding employment is in Honduras, not only generally, but for him specifically because of his limited ability to lift in working on a job, and the likelihood

[Page 10 of original opinion is missing]

States and departure from the United States is credible. I am very skeptical, in fact, rather disbelieving of his testimony concerning his touching the defendant in the offense which culminated in his conviction of sexual abuse in the fourth degree. I do not believe that that testimony is credible. However, the respondent has expressed remorse for that offense, and I do not think that that should be dismissed out of hand. More importantly, the passage of time gives expression, I think, to the respondent's claims of being rehabilitated. The 7th Circuit Court of Appeals in Palacios-Torres V. INS, 7th Circuit, May 18, 1993, held that rehabilitation has two focuses. One is the restoration of an individual to a new way of life, in that case, a drug free way of life, and the other, a more general condition is that it is a restoration to a way of life where future criminal conduct is unlikely. In this case, the respondent is not associating with the same people anymore, or so he says in his testimony, and, in addition, a significant period of time, namely eight years, has elapsed since his conviction. That period I think one can measure the respondent's intentions by his actions. The record indicates that he has not been convicted of any crime since 1996. I think, therefore, that it can be said that the respondent has been reformed so that he has chosen a way of life where future criminal misconduct is unlikely

because he has not been involved in criminal misconduct since his November of 1996 conviction.

No. 06-1369

In the Supreme Court of the United States

EUSEBIO GUEVARA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, when an immigration judge (IJ) finds an alien removable but grants discretionary relief from removal, the Board of Immigration Appeals has the authority to order the alien removed upon overturning the IJ's grant of discretionary relief.

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In the Supreme Court of the United States

No. 06-1369

EUSEBIO GUEVARA, PETITIONER

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ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 472 F.3d 972. The decisions of the immigration judge (Pet. App. 12a-20a) and the Board of Immigration Appeals (Pet. App. 9a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2007. The petition for a writ of certiorari was filed on April 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for removal of an alien from the United States upon entry of an order of removal. See 8 U.S.C. 1227(a) (2000 & Supp. V 2005);

8 U.S.C. 1231(a). The INA defines an "order of deportation"—now an "order of removal"—as follows:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of—
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

8 U.S.C. 1101(a)(47).[1]

2. Petitioner is a native and citizen of Honduras who first came to the United States in 1985 and became a lawful permanent resident in 1990. Pet. App. 1a. On July 9, 1991, petitioner was convicted of retail theft, in violation of California law, for which he was sentenced to one day in jail and three years of probation. *Id.* at 9a-10a. On November 27, 1996, petitioner was convicted of

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[1] The term "special inquiry officer" refers to an immigration judge. See 8 C.F.R. 1.1(*l*) (1996). Because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, "did away with the previous legal distinction among deportation, removal, and exclusion proceedings," *United States* v. *Pantin*, 155 F.3d 91, 92 (2d Cir. 1998), the term "order of removal" includes statutory references to "order of deportation" and "order of exclusion," see *id.* at 93.

two counts of fourth-degree sexual assault, in violation of Wisconsin law, for which he was sentenced to 63 days of imprisonment and eighteen months of probation. *Id.* at 1a.

When petitioner re-entered the United States in June 2004 after a visit to Honduras, he was placed in removal proceedings and was charged with being inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) as an alien convicted of a crime involving moral turpitude. Pet. App. 1a. Petitioner contested removability, denying that he had been convicted of the two previous offenses, and he also applied for a discretionary waiver of inadmissibility under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994). Pet. App. 1a-2a, 13a.[2]

3. The immigration judge (IJ) found petitioner removable and granted him discretionary relief from removal. The IJ first determined that petitioner was removable because he had been convicted of the offenses

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[2] Under former Section 212(c), a permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" could apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 289, 295 (2001). The applicant for relief bore the burden of demonstrating that his application merited favorable consideration. *In re Marin*, 16 I. & N. Dec. 581, 583-585 (B.I.A. 1978). When considering a Section 212(c) application, an IJ "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country." *Id.* at 584. In IIRIRA, Congress repealed 8 U.S.C. 1182(c) (1994), and replaced it with 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. See Pub. L. No. 104-208, Div. C, § 304, 110 Stat. 3009-594, 3009-597. Relief under former Section 212(c) nonetheless remains available for aliens, such as petitioner, whose convictions were obtained through a plea agreement and who would have been eligible for relief under the law then in effect. See *St. Cyr*, 533 U.S. at 314-326.

specified in his notice to appear and because the sexual assault conviction was a crime involving moral turpitude. Pet. App. 13a-14a. The IJ then determined that petitioner was eligible for a waiver of inadmissibility, *id.* at 14a-15a, and that he merited such a waiver as a matter of discretion, *id.* at 15a-20a. The IJ noted that petitioner's sexual assault crime was "serious" because it involved abusing his girlfriend's young daughter and because petitioner still "denies that he ever touched the child" even though he pleaded guilty, and as a result, petitioner would have to "show equities which rise to a fairly significant level in order to merit the granting of relief." *Id.* at 16a, 18a. But the IJ found positive factors sufficient to merit granting relief, including the "duration of [petitioner's] presence in the United States," his employment history, the financial support he provides to his wife and children in Honduras, "how difficult the situation for finding employment is in Honduras," and petitioner's rehabilitation, which was evidenced by the fact that he "has not been convicted of any crime since 1996." *Id.* at 18a-19a.

The Board of Immigration Appeals (BIA) sustained the government's appeal of the IJ's grant of relief from removal. Pet. App. 9a-11a. The BIA determined that "the immigration judge sufficiently set forth the positive and negative factors presented in this case," but "upon weighing those factors," the BIA determined that petitioner "d[id] not merit a discretionary grant of a section 212(c) waiver." *Id.* at 11a. The BIA "acknowledge[d]" positive factors such as "the difficult conditions in Honduras, [petitioner's] long residence in the United States, his employment history, and the financial support he provides his family," but it viewed rehabilitation as a "neutral factor" because, although petitioner's sexual

assault conviction was nine years old, the offense is serious and petitioner failed to "acknowledge his wrongdoing." *Ibid.* The BIA then ordered petitioner removed to Honduras. *Ibid.*

4. The court of appeals denied the petition for review. Pet. App. 1a-8a. It first rejected petitioner's contention that the BIA failed to defer sufficiently to the IJ's factual finding concerning petitioner's rehabilitation. *Id.* at 6a. The court of appeals explained that the BIA did not overturn any factual findings but instead permissibly "reweighed the positive and negative factors and concluded that rehabilitation was a neutral factor" as a matter of the exercise of discretion. *Id.* at 6a.

The court then rejected petitioner's contention that the BIA had exceeded its authority by ordering him removed rather than remanding to the IJ to enter such an order. Pet. App. 6a-8a. Petitioner had argued, based on the Ninth Circuit's now-overruled decision in *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937, 940-941 (9th Cir. 2004), overruled by *Lolong* v. *Gonzales*, 484 F.3d 1173, 1176-1178 (9th Cir. 2007) (en banc), that only IJs have the authority to order an alien removed. Pet. App. 7a. The court of appeals rejected that argument, agreeing with the other courts of appeals that had held that the BIA may order removal after it reverses a grant of discretionary relief when the IJ has already found the alien removable. *Ibid.* (citing *Lazo* v. *Gonzales*, 462 F.3d 53, 54-55 (2d Cir. 2006), cert. denied, 127 S. Ct. 2909 (2007); *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 600-601 (5th Cir. 2006); and *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006)).

The court of appeals explained that "the conclusion that the BIA has the authority to enter the order it did * * * flows from" the statutory definition of "order

of deportation," because an "order of deportation" includes both an IJ's order "'*concluding that the alien is deportable*'" and one "'ordering deportation.'" Pet. App. 7a (quoting 8 U.S.C. 1101(a)(47)(A)). Accordingly, the IJ's initial order that petitioner was removable (deportable) was an "order of deportation," even though the IJ went on to grant petitioner relief from removal as a matter of discretion. *Id.* at 8a. Moreover, the court noted, an "order of deportation" becomes final "upon the earlier of a determination by the Board of Immigration Appeals affirming such order" or the expiration of the time to appeal to the BIA, *id.* at 7a (quoting 8 U.S.C. 1101(a)(47)(B)). Thus, the court concluded, "if an IJ decides that an alien is removable but does not ultimately order removal due to a grant of a waiver, cancellation, or the like, the decision that the alien is removable is nonetheless an 'order of deportation' that may be affirmed by the BIA." *Id.* at 7a-8a. In sum, the court explained, the IJ's finding that petitioner was removable based on his crime involving moral turpitude "constituted an order of deportation (i.e., removal) that could be given effect by the BIA once it reversed the IJ's subsequent conclusion that [petitioner] was entitled to a discretionary waiver of removal." *Id.* at 8a.

ARGUMENT

Petitioner seeks review of the now-uniform rule in the courts of appeals that the BIA may order deportation when an IJ has previously determined that an alien is removable but granted relief from removal and the BIA reverses the IJ's grant of relief from removal. This Court recently denied review of that question, see *Lazo* v. *Gonzales*, 462 F.3d 53 (2d Cir. 2006), cert. denied, 127

S. Ct. 2909 (2007), and there is no reason for a different disposition here.

1. Petitioner contends (Pet. 11-29) that the BIA exceeded its authority in ordering him removed to Honduras rather than remanding his case to the IJ for entry of an order of removal. The court of appeals correctly rejected that argument. As the court of appeals explained, the INA defines an "order of deportation" as "the order of the [IJ] * * * concluding that the alien is deportable *or* ordering deportation." 8 U.S.C. 1101(a)(47)(A) (emphasis added); see Pet. App. 7a. In this case, the IJ found that petitioner was removable based on his crime of moral turpitude, but then granted relief from removal under former Section 212(c). *Id.* at 14a, 20a. The IJ's determination that petitioner was removable was an "order of deportation" within the meaning of Section 1101(a)(47)(A) because it "conclud[ed] that the alien is deportable." Pet. App. 7a (quoting 8 U.S.C. 1101(a)(47)(A) (emphasis omitted)).[3] When the BIA overturned the IJ's grant of discretionary relief, it "g[ave] effect" to "the IJ's first holding" of "removability" which the BIA had left "intact." *Id.* at 8a. The BIA was not required to remand for an entry of order of removal because it could (and did) order removal based on the order the IJ had already entered. *Id.* at 7a-8a. The decision below is compelled by the plain language of

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[3] Contrary to petitioner's suggestion (Pet. 23), the court of appeals did not impermissibly "equate[] a finding of removability with an order of deportation." The court of appeals relied on the plain language of Section 1101(a)(47)(A), which defines an "order of deportation" as including *both* an order "concluding that the alien is deportable" *and* one "ordering deportation." Pet. App. 7a-8a. The various statutory and regulatory provisions that petitioner cites to distinguish between the two (Pet. 23-24) are therefore inapposite.

the statute. It also is consistent with common sense. It is the norm in administrative practice that the appellate body in an agency renders the dispositive decision in a matter if an appeal has been taken to that body. And it would be a waste of time and resources—and would delay the expeditious removal of aliens who have been found to have no grounds for remaining in the United States—if the BIA were required to remand the case to the IJ for the formality of entering an order of removal.

Petitioner contends that the conclusion of the court below "cannot be squared with the statutory and regulatory scheme" because "[t]he BIA * * * has no legitimate authority in that scheme to enter an order of deportation in the first instance." Pet. 12. But, as the court of appeals explained, the IJ's "threshold determination" that petitioner was removable itself was an "order of deportation" under Section 1101(a)(47)(A), to which the BIA simply "g[ave] effect," Pet. App. 8a; the BIA did not order deportation "in the first instance." Contrary to petitioner's suggestion (Pet. 20), there is no question raised in this case about whether the BIA itself may issue an order of deportation in the first instance when an IJ fails to do so.

Nor does the decision below raise a "crucial question of institutional competence." Pet. 21. The court of appeals did not dispute that IJs are statutorily authorized to "decide whether an alien is removable from the United States" in the first instance. 8 U.S.C. 1229a(c)(1)(A); see 8 C.F.R. 1240.1(a)(i), 1240.12. And the BIA acted well within its role as an appellate body when it reversed the IJ's grant of discretionary relief and ordered removal based on the IJ's determination that petitioner was removable. See, *e.g.*, *Lazo*, 462 F.3d at 54 ("The BIA's power to review and overturn the

IJ's grant of discretionary relief is unchallenged."). The court of appeals' decision is thus fully consistent with the statutory scheme.

2. Petitioner contends (Pet. 11) that there is an "entrenched and persistent split among the Courts of Appeals" on the question presented. There is no conflict in the circuits warranting review. Although the Ninth Circuit had previously issued a decision supporting petitioner's view, the circuit has revisited the issue en banc, overruled the decision on which petitioner relies, and eliminated any conflict in the circuits.

In addition to the court of appeals below, all five of the other courts of appeals that have addressed the issue have held that the BIA may order an alien removed if the IJ has found the alien removable but granted relief from removal and the BIA reverses the IJ's grant of relief, because the IJ's initial determination that the alien is removable qualifies as an order of removal under Section 1101(a)(47)(A). See *Lolong* v. *Gonzales*, 484 F.3d 1173, 1176-1178 (9th Cir. 2007) (en banc); *Sosa-Valenzuela* v. *Gonzales*, 483 F.3d 1140, 1146 (10th Cir. 2007); *Lazo* v. *Gonzales*, 462 F.3d 53, 54-55 (2d Cir. 2006), cert. denied, 127 S. Ct. 2909 (2007); *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 600-601 (5th Cir. 2006); *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006). And yet another court of appeals has assumed that the BIA may order removal under those circumstances. See *Del Pilar* v. *United States Att'y Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003).

As petitioner explains (Pet. 14-16), the Ninth Circuit initially held to the contrary in *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937, 940 (2004). That decision, which was the first court of appeals decision to consider the issue, did not discuss whether the definition of "order of

removal" in Section 1101(a)(47)(A) encompasses an order finding that an alien is removable. See *id.* at 941 ("There is no statutory authority * * * that supports the assertion that a finding that a petitioner is removable is the same thing as an order of removal."). Indeed, several courts of appeals expressly rejected the Ninth Circuit's holding because it failed to address the relevant statutory language. See, *e.g.*, *Lazo*, 462 F.3d at 55; *Sosa-Valenzuela*, 483 F.3d at 1146 n.10.

The Ninth Circuit then decided to revisit—and overrule—*Molina-Camacho*. In *Lolong* v. *Gonzales*, the en banc court of appeals explained that when an IJ finds an alien deportable and then grants relief, the initial determination "that the alien is deportable" "constitutes an 'order of deportation'" within the meaning of Section 1101(a)(47)(A). 484 F.3d at 1177. Thus, when "the BIA reverses an IJ's grant of relief * * * an order of deportation has already been properly entered by the IJ" and the BIA may "simply reinstate[] the order of removal that has already been entered by the IJ and that would have taken effect but for the IJ's subsequent cancellation of removal." *Ibid.* Rejecting its prior reasoning that to allow the BIA to order removal under those circumstances would "conflate[] the BIA's uncontested *substantive* power to reverse a finding of removability * * * with the *procedural* power to issue the order of removal that results from such a reversal," *Molina-Comacho*, 393 F.3d at 941, the court of appeals stated that "[r]einstating a prior order of removal by eliminating the impediment to that order's enforcement is entirely consistent with the BIA's appellate role," *Lolong*, 484 F.3d at 1177; see *id.* at 1178 ("[T]he BIA's actions were entirely within the scope of its powers under the INA.").

Thus, the uniform view of the courts of appeals is that the BIA had the authority to order removal in the circumstances of this case. *Lolong*, 484 F.3d at 1178. And, not surprisingly, the long-established practice of the BIA that the courts of appeals have sustained has not led to any of the "mass confusion" that petitioner claims would result. Pet. 25.

3. Even if the BIA were required to remand this case to the immigration judge to issue an order of removal, the outcome of this case would not be affected. The IJ found that petitioner was removable as charged, Pet. App. 13a-15a; the BIA did not disturb the filing, *id.* at 9a-11a; and petitioner does not challenge it here. Although petitioner has suggested that the BIA should be required to remand to an IJ after reversing a grant of relief from removal because "the IJ [may have] had several reasons for his decision to allow the alien to stay in America, yet only reached one," Pet. 22, petitioner himself applied for only one form of relief from removal. Accordingly, a decision by this Court will not affect petitioner's ultimate removal from the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

EUSEBIO GUEVARA,

Petitioner,

v.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

In this case, the Seventh Circuit joined the Second, Fifth, and Eighth Circuits (in acknowledged conflict with the Ninth Circuit) in their interpretations of the term "order of deportation" under 8 U.S.C. § 1101(a)(47). The Court below held, contrary to plain statutory language and in a way that does violence to the integrity of immigration law as a whole, that an IJ's finding that an alien is removable—even where the IJ ultimately grants discretionary relief and orders that the alien not be removed—is the same thing as an "order of deportation." (Pet. App. 7a-8a.) At a minimum, this approach permits the Courts of Appeals to reach beyond classic final "order[s] of deportation" and adjudicate myriad petitions for review that otherwise would be beyond their jurisdiction. They are, in fact, already doing so. Worse, this approach would—if taken literally—require aliens to file *two* piecemeal appeals to the BIA in nearly every immigration case (and *two* later petitions in a federal Court of Appeals in each such case) to preserve their rights: one on the finding of removability (now termed an "order of deportation"), and one on the final order either granting discretionary relief or ordering that the alien be removed.

After the Petition was filed, the Ninth Circuit overruled itself *en banc*, joining the Seventh Circuit and the others in their statutory misinterpretation. The Ninth Circuit, which adjudicates nearly half of all petitions for review of immigration decisions filed in the federal appellate courts (Pet. at 13 & n.2), has thus now joined a school of thought that is not only wrong as a matter of statutory interpretation, but that threatens to deluge the federal Courts of Appeals with multiple petitions for review of BIA decisions—and indeed, is already beginning to do so. Far from fixing the problem raised in the petition by eliminating a Circuit split, the Ninth Circuit's decision further enshrines (and thus exacerbates) the problem. Indeed, by resolving the split as it has, the Ninth Circuit has actually increased the importance of this issue. For one thing, it will now affect the significant

number of immigration cases arising in the Nine Western States. For another thing, the Circuits that have spoken are now unanimous as to their ability to review BIA cases outside of their statutorily-established jurisdiction. The Courts of Appeals are already exercising this expanded jurisdiction to hear more petitions for review of BIA decisions. And the number of these cases only threatens to increase as cautious aliens, taking the law as it now exists seriously, file ever-more numerous piecemeal BIA appeals (and subsequent federal court petitions for review).

Further percolation of this issue is thus unlikely to provide additional considered analysis. This Court's corrective action is urgently needed now. *See* ROBERT L. STERN, ET AL. SUPREME COURT PRACTICE 247 (8th ed. 2002) (noting that certiorari is appropriate when the issue of statutory construction is important, importance being shown, inter alia, by "the significance of the issue in the administration of the statute" and "the serious hindrance to the effective administration of the law caused by the lower court decision"). The Petition should be granted.

ARGUMENT

The Government's argument in opposition to certiorari largely ignores petitioner's showing that the Seventh Circuit's equating of a finding of removability with an "order of deportation" cannot be squared with either the plain language of the relevant statute, or the immigration statutory and regulatory scheme as a whole. (*See* Pet. at 20-24.) Instead, the Government urges denial of the Petition on two grounds. *First*, the Government asks the Court to focus on the "plain language" of 8 U.S.C. § 1101(a)(47)(A), and ignore the rest of the statutory and regulatory scheme governing immigration. *Second*, the Government contends that, since no mass confusion has yet resulted, this Court should simply ignore the legal error now uniformly embraced by the Courts of Appeals. Neither contention has merit.

I. THE CURRENT JURISPRUDENCE OF THE COURTS OF APPEALS IS IN CONFLICT WITH THE STATUTORY AND REGULATORY SCHEME GOVERNING IMMIGRATION CASES.

1. The Government first argues that the "plain language" of 8 U.S.C. § 1101(a)(47)(A) supports what the BIA did here, ordering petitioner's removal from the United States. Even the Government does not contend that the BIA has the power to order such removal in the first instance. (Pet. at 20-21.) Instead, it simply repeats the conclusion of the court below, that an IJ's finding of removability itself constitutes an "order of deportation" that the BIA is free to affirm. (Opp. Br. at 7.) If proper statutory interpretation focused on words in isolation, without regard for the fuller context of the statute, then perhaps Government's reading would be plausible. But it cannot be sustained—especially on a fuller examination of the framework of immigration law as a whole—for three reasons.

First, even on its own terms, this isolationist approach to statutory interpretation, when taken to its logical conclusion, would produced absurd results. If a finding of removability is the same thing as an order of deportation under § 1101(a)(47)(A), that "order of deportation" would become final if not appealed within 30 days. 8 U.S.C. § 1101(a)(47)(B)(ii); 8 C.F.R. § 1103.39. But a finding of removability is a prerequisite for almost every form of relief from removal. (Pet. at 5-6.) Thus, under the Government's "plain meaning" interpretation, any time an alien is granted relief from removal (meaning he can stay here), and the Government chooses not to appeal the IJ's decision, the alien would nonetheless be subject to a "final order of removal" 30 days later—even though the effect of that "final order of removal" is that the alien is *not* ordered removed. The government's "plain language" reading of the statute, when examined closely, is anything but plain.

Second, the Government's preferred construction of § 1101(a)(47)(A) cannot be squared with related provisions of the immigration code and regulations. (Pet. at 23-24.) Perhaps that is why the Government so desperately contends that only § 1101(a)(47)(A) should be consulted here, and the rest of immigration law should be ignored. (Opp. Br. at 7 n.3.) But "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and "[a] court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations and internal quotation marks omitted).

Indeed, the Government's construction would vitiate the entire category of § 212(c) relief that petitioner sought in this case. According to that statute, "[a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General[.]" *See* 8 U.S.C. § 1182(c) (1995). Yet, removability is a precondition for a grant of cancellation of removal to both lawful permanent residents and non-residents. *Id.* § 1182(a). And, by regulation, lawful permanent residents lose their status as lawful permanent residents (and thus their "lawful . . . domicile") upon entry of a final order of removal. 8 C.F.R. § 1.1(p). Accordingly, under the Government's reading of § 1101(a)(47)(A), when a lawful permanent resident is found to be removable (and does not appeal that finding within 30 days, as typically happens in a protracted proceeding where removability and relief from removal are separated in time by months or years (Pet. at 6, 25)), he becomes subject to a "final order of deportation," and thus loses both his lawful permanent resident status and his ability to apply for § 212(c) relief—regardless of whether any of his discretionary claims have

been addressed. *See In re Lok*, 18 I. & N. Dec. 101 (BIA 1981); *In re Duarte*, 18 I. & N. Dec. 329 (BIA 1982). That is, the Government's statutory construction renders § 212(c) relief a cipher—a nullity.

Third, the Government's reading conflates the BIA's uncontested substantive power to reverse a finding of removability or eligibility for cancellation of removal on appeal with the procedural power to issue the order of removal that results from such a reversal. (Pet. at 21-22.) While the Government implies that institutional competence is simply not important in an agency context generally (claiming, with no precedential citation, that the "norm in administrative practice" is for an appellate body to render a dispositive decision), the argument ignores the clear statutory language mandating that, in the immigration context specifically, a final order of deportation may *not* be issued in the first instance by the BIA. *(Id.* at 20-21.) Indeed, the Tenth Circuit squarely rejected a similar argument that the statutory scheme at issue here permits the BIA to enter an order of deportation in the first instance. *Sosa-Valenzuela v. Gonzales*, 483 F.3d 1140, 1145 (10th Cir. 2007) ("As a threshold matter, the statutory scheme does not grant the BIA the independent authority to conduct removal proceedings. Removal proceedings are authorized by statute and in the first instance are conducted only by immigration judges.").[1]

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[1] Interestingly, although the Government ignores the holding of *Sosa-Valenzuela* when arguing for a "common sense" interpretation of Section 1101(a)(47)(A), it is willing to cite the case's *dictum* as an authoritative holding one page later. (Opp. Br. at 9) As the Tenth Circuit made clear in that case, it was not considering a situation like the one here, where the IJ made a finding of removability, then granted a relief from removal that was later reversed by the BIA. *See Sosa-Valenzuela*, 483 F.3d at 1146. Thus, nothing in that case can properly be considered a holding "that the BIA may order an alien removed if the IJ has found the alien removable but granted relief from removal[.]" (Opp. Br. at 9.)

Moreover, institutional competence within this statutory scheme is about more than a technical reading of the statute. Two principal inquiries govern whether an alien is allowed to stay in this country: (1) the legal question of whether the alien is removable, and if so, (2) a discretionary inquiry into whether he should in fact be removed. (Pet. at 5-6.) The now-uniform view of the Courts of Appeals that have addressed the issue strips the alien of the opportunity, after a successful government appeal, to prove, based on the typically discretionary and equitable "totality of the circumstances," that while legally removable, he should not be removed, even in light of the BIA's analysis of the particular factors initially relied upon by the IJ. The result would be to deprive a petitioner of a full opportunity to litigate his right to discretionary relief, which is typically the only substantive issue in immigration cases.

This underscores why the Government is wrong to suggest that institutional competence in this case can be disregarded because, even assuming that the BIA does not have the power to order removal, "a decision by this Court will not affect [petitioner]'s ultimate removal from the United States." (Opp. Br. at 11.) This view of petitioner's prospects on remand ignores two key points.

First, when the BIA considered petitioner's case, it declared that rehabilitation was a "neutral factor." (Pet. App. 11a.) Two years have now passed since the BIA's opinion, during which petitioner has not engaged in any criminal conduct; that should positively affect the equitable analysis concerning rehabilitation. In addition, remand would afford petitioner the opportunity to better explain his remorse for his prior actions and take responsibility for them. Both individually and cumulatively, these considerations would dramatically change the discretionary landscape for addressing petitioner's eligibility for § 212(c) relief.

Second, a page of the transcript of the IJ's initial grant of relief from removal had gone missing by the time this case

went before the BIA. That page contained the bulk of the IJ's discussion of the factors weighing in favor of granting relief from removal. Accordingly, following a remand to the IJ, the BIA would have a fuller picture of the reasons petitioner should be allowed to stay in the country than it did when first ruling on his case. This, too, should cause the balance of equities to tip in petitioner's favor on the discretionary question of § 212(c) relief.

2. The cases upon which the Government's argument relies similarly (and wrongfully) ignore the statutory and regulatory scheme as a whole. Most were discussed in the Petition and need not be revisited here. Indeed, only a single case that the Government cites, the Ninth Circuit's recent *en banc* opinion in *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007), even attempts to consider the entire immigration scheme. Yet even that opinion omits mention of all the statutes and regulations that conflict with the court's view.

In *Lolong*, perhaps because neither party was advocating in favor of the court's prior (and correct) decision in *Molina-Camacho v. Ashcroft*, 393 F.3d 937 (9th Cir. 2004), which created the Circuit split discussed in the Petition, the Ninth Circuit determined that *Molina-Camacho*, in conjunction with a new provision in the REAL ID Act, would create a "limbo" in which an alien could be subject to a void order of removal but have no judicial remedy. *Id.* at 1176-77. In part to avoid the constitutional problems associated with such a situation, the court overturned its holding in *Molina-Camacho*. *Id.* This concern was, however, unfounded.

The *Lolong* court began its analysis by noting that, under 8 U.S.C. § 1252(a), jurisdiction in the court of appeals is limited to review of final orders of removal. *Lolong*, 484 F.3d at 1176. The court then acknowledged that under the REAL ID Act, "'a petition for review filed with an appropriate court of appeals . . . shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this Act[.]'" *Id.* (quoting 8 U.S.C. § 1252(a)(5) (ellipsis in original)).

Reading these two provisions side-by-side, the court was concerned that because the REAL ID Act precluded collateral review of orders of removal in the district court, any *ultra vires* act by the BIA would leave an alien with no avenue of recourse. *Id.* at 1177.

This logic, though, ignores *Molina-Camacho*'s sound conclusion that an *ultra vires* order from the BIA is a "legal nullity." *Molina-Camacho*, 393 F.3d at 942. Because the BIA's action cannot properly be characterized as *any* legal action, let alone an "order of removal . . . entered or issued under any provision of [Title 8 of the United States Code]," it remains cognizable as a habeas claim in district court. Habeas review would only be precluded if one assumes the conclusion of the argument—that the BIA can issue an order of removal under the terms of the statutory and regulatory scheme, or that the IJ had already entered a valid order of removal. That the BIA might label its action a "final order of removal" does not mean it would be so. *Cf. Jackson v. United States*, 463 F.3d 635, 639 (7th Cir. 2006) ("Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, *coram nobis*, *coram vobis*, *audita querela*, certiorari, capias, habeas corpus, ejectment, *quare impedit*, bill of review, writ of error, or an application for a Get-Out-of-Jail Card; the name makes no difference. It is substance that controls."). The Ninth Circuit's logic simply cannot withstand scrutiny.

II. THE OPINIONS OF THE COURTS OF APPEALS THREATEN SUBSTANTIAL CONFUSION REGARDING THE PROPER APPELLATE PROCEDURE FOR IMMIGRATION CASES.

The logic of the Seventh Circuit's view regarding what constitutes an "order of deportation" under 8 U.S.C. § 1101(a)(47)(A) also threatens broader practical ramifications for an already overtaxed immigration system. This reasoning is already permitting the federal Courts of Appeals to reach beyond their statutorily-limited jurisdiction to review a host of BIA decisions that are not, under a proper

understanding, final "order[s] of deportation." Worse, if this Court does not reverse the current trend in this area of jurisprudence, mass confusion and needless inefficiency will result. (Pet. at 24-29.) The Government's response, an assertion that the issue has not yet caused mass confusion, is cold comfort given what has already happened, and what the logic of these decisions compels. (Opp. Br. at 11.)

First, treating a finding of removability as an "order of deportation" has already had an impact on the workload of the Courts of Appeals. This is a case in point: Under a proper understanding of "order of deportation" (now referred to as an order of "removal"), which requires an IJ order actually mandating that an alien *be removed* (as opposed to a simple finding of removability conjoined with a discretionary grant of relief from removal), this case could never have been heard by the Seventh Circuit, whose jurisdiction is limited to "review [of] . . . a final order of removal[.]" 8 U.S.C. § 1252(a)(1). Here, the IJ found petitioner removable, but granted him discretionary § 212(c) relief, and the BIA reversed the discretionary grant. The BIA should have remanded to the IJ for further consideration and, if appropriate, entry of a final order *both* finding petitioner removable *and* actually ordering him removed. The Seventh Circuit should have not have reviewed the combined work of the IJ and the BIA without such an order from the IJ in place.

Worse, other Courts of Appeals are going even further beyond the bounds of their jurisdiction to review BIA decisions. Indeed, some courts are reviewing such decisions when the BIA has actually *ordered remand* to the IJ to consider additional discretionary relief and enter an appropriate "order of deportation" to give the Courts of Appeals jurisdiction. *See, e.g.*, *Zahren v. Gonzales*, 487 F.3d 1039, 1140 & n.2 (7th Cir. 2007) (rejecting Government's challenge to jurisdiction where the BIA had remanded for consideration of voluntary departure); *Saldarriaga v. Gonzales*, 402 F.3d 461, 465-66 (4th Cir. 2005) (collecting

cases), *cert. denied*, 546 U.S. 1169 (2006). Thus, the Government's arguments notwithstanding, the logic of the court below (which commands the assent of all courts of appeals to have considered the issue) is *already* increasing the workload of the federal Courts of Appeals.

Second, although the Government asks this Court to ignore the logically inescapable consequences of the Seventh Circuit's flawed reasoning in the hope that they never occur, this is wishful thinking. Leaving the current rule intact requires cautious, prudent immigration counsel to advise clients to conduct themselves as if a finding of removability were an "order of deportation" within the meaning of Section 1101(a)(47). (*See* Pet. at 25-26.) Accordingly, the now-ascendant interpretation of § 1101(a)(47) requires early and multiple appeals to the BIA (and later petitions for review in federal court) in *every kind* of immigration matter requiring a threshold determination of removability before a later question of eligibility for relief can be addressed. That, in turn, will inevitably lead to the adverse consequences detailed in the Petition. (Pet. at 26-28.) (The BIA, after all, *already* decides over 40,000 appeals per year. (*EOIR Statistical Yearbook*, at S2, *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf).)

Like the cautious alien, this Court should not be willing to gamble that the current quietly illogical trend of ignoring the 30-day appellate timeline for one sort of "order of deportation" (a finding of removability) but not the other (an actual order of removal) will continue indefinitely. That is especially so now that the Ninth Circuit, which until recently had refused to adopt this inefficient rule, has now joined the rest of the Circuits in adhering to it—and that Circuit alone adjudicates nearly half of all petitions for review of BIA decisions filed in the federal courts of appeals. (Pet. at 13 & n.2.) Only this Court's review can guarantee that needless confusion and inefficiency will be avoided.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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